I 19

RELEASED IN FULL

List of issues to be considered during the examination of the second periodic report of the United States of America

Response of the United States of America

Article 1

1. If, according to the report (CAT/C/48/Add.3 ("the report"), para. 11), **"[t]he definition of torture accepted by the United States upon ratification of the Convention ... remains unchanged", why did the Department of Justice issue a memorandum in August 2002** (United States Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for Alberto R. Gonzales*, 1 August 2002, p. 46) **which concluded "that torture as defined in and proscribed by section 2340-2340A [of the United States Code] covers only extreme acts?" Please explain how this is compatible with article 1 of the Convention.**

2. Please explain the substantive reasons why, if the definition of torture remained unchanged, the August 2002 memorandum was itself replaced in December 2004 (United States Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, *Memorandum for James B. Comey, Deputy Attorney General*, 30 December 2004), **by a new memorandum and whether any of the conclusions of the August 2002 memorandum are still valid. How does a memorandum interpret a convention, and is it legally binding?**

The United States has not changed the definition of torture it accepted upon ratification of the Convention.

When the United States Senate provided its advice and consent to ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), it adopted understandings which clarified how the United States would interpret and apply the definition of torture contained in Article 1 of the CAT. The United States included these understandings in its instrument of ratification deposited with the Secretary General in 1994. In light of the fact that the CAT required the imposition of criminal penalties under U.S.

UNITED STATES DEPARTMENT OF STATE
REVIEW AUTHORITY: ERIC W FLEISHER
DATE/CASE ID: 19 FEB 2008 200706444

law, these understandings were intended to clarify the standards by which the Convention would be applied as a matter of U.S. law, as well as guard against the improper application of the CAT to legitimate U.S. law enforcement activities. These understandings of the definition of torture were also reflected in 18 U.S.C. § 2340 and 2340A, as amended ("the extraterritorial criminal torture statute"), providing for federal criminal jurisdiction over certain extraterritorial acts of torture.

Within the United States Government, the U.S. Department of Justice ("DOJ") enforces the criminal laws of the United States. Indispensable to that task is interpreting the scope of criminal statutes such as 18 U.S.C. § 2340 and 2340A. In addition, the Department's Office of Legal Counsel ("OLC") provides opinions on questions of law, including matters related to statutes and treaties, to the Executive Branch of the United States Government, including the President and heads of departments.

In August 2002, the OLC issued a memorandum that provided legal advice on the meaning of the term "torture" under the extraterritorial criminal torture statute (which, as explained below, implements portions of the CAT), as well as addressing issues concerning the separation of powers under the United States Constitution. This opinion was requested to provide operational guidance with respect to the implementation of the criminal statute at the level of detail needed to guide officials who were concerned about compliance with the Convention and domestic law.

As noted above, the August 2002 opinion concluded that torture as defined in the criminal statute only covers extreme acts. As explained in the response to Question 3 below, extreme acts were precisely what the CAT was intended to cover.

As the Committee notes, the OLC later withdrew that opinion and issued another opinion dated December 30, 2004, which is confined to an interpretation of the extraterritorial criminal torture statute. The December 2004 opinion supersedes the August 2002 opinion in its entirety and thus provides the Executive Branch's authoritative interpretation of the extraterritorial criminal torture statute.

The August 2002 opinion was withdrawn not because it purported to change the definition of torture but rather because it addressed questions that were not necessary to address. In this regard, the December 2004 Memorandum clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[1]

The purpose of both opinions was to provide legal advice related to a domestic criminal statute. Neither opinion purported to change the definition of torture set out in Article 1 as understood by the United States. The question that the OLC addressed was simply what the terms of that definition, as now reflected in the United States Code, mean.

3. Please explain the compatibility with the Convention of the memorandum of 30 December 2004 (Para. 13 and annex 3 to the report), **which states that "[t]he term 'torture', in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices …",** (*Memorandum for James B. Comey*, op. cit., p. 6) **and that "[t]he [Convention against Torture] thus treats torture as an 'extreme form' of cruel, inhumane, or degrading treatment",** (Ibid.) **and that "[t]he requirement that torture be an extreme form of cruel and inhuman treatment is expressed in article 16 …"** (Ibid., p. 7) **[of the Convention]. J. Herman Burgers and Hans Danelius** (Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, 1988, p. 117, *in fine*), **quoted as authorities in the 30 December 2004 memorandum, expressly state that " … extreme or extremely severe pain [was] suggested during the *travaux préparatoires*, but the phrase 'severe pain' was considered sufficient to convey the idea that only acts of a certain gravity shall be considered to constitute torture". Please explain how this interpretation is compatible with article 1 of the Convention.**

---

[1] Memorandum for James. B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) at 2.

The language in the CAT that defines torture and that subsequently refers to "other acts of cruel, inhuman or degrading treatment or punishment" reflects the recognition of the negotiators that torture applied to more severe acts of cruelty and abuse than did cruel, inhuman or degrading treatment or punishment. Thus, Article 1(1) of the CAT provides that "the term 'torture' means any act by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted on a person,..." (Emphasis added). In contrast, Article 16(1) of the CAT does not use the term "severe" but provides, "Each State Party shall undertake to prevent in any territory under its jurisdiction *other acts* of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in Article 1." (Emphasis added). This basic distinction between the severity of the conduct constituting torture and cruel, inhuman and degrading treatment or punishment is reflected in the underlying regime to combat and prevent each form of conduct. Specifically because of the aggravated nature of torture, States Parties agreed to comprehensive measures to prohibit it under their criminal law, to prosecute perpetrators found in territory under their jurisdiction, and not to return individuals to other States where there are substantial grounds for believing that such persons would be in danger of being subjected to torture. In contrast, the obligations regarding cruel, inhuman or degrading treatment or punishment are more limited.

The December 2004 memorandum recognizes what is clear from the text and structure of the CAT. As an initial matter, the passages quoted in the Committee's question were themselves quotations from the Senate Committee Report recommending ratification of the CAT. *See Convention Against Torture and Other Cruel, Unusual or Degrading Treatment or Punishment*, S. Exec. Rep. No. 101-30 at 6, 13-14 (1990). Consistent with the Senate Report, the December 2004 memorandum also distinguishes "torture" from "other acts of cruel, inhuman or degrading treatment or punishment" as expressed in Article 16 of the CAT, by explaining that torture is a more severe or extreme form of mistreatment than that described by Article 16. The use of the word "extreme" in these contexts clarifies the meaning of the word "severe" contained in the definition of torture set forth in Article 1 of the CAT and further elaborated in the U.S. understanding. *See December 2004 Memorandum* at 3 (citing dictionary definitions of "severe" as "extreme")

The negotiating history of the CAT confirms the plain language of the treaty, and that the definition of torture was reserved for those acts involving more severe pain and suffering, as distinguished from cruel, inhuman or degrading treatment or punishment. During the negotiations of the CAT, both the United States and the United Kingdom emphasized the intensity and severity required in order for an act to be considered "torture." *See* Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Summary Prepared by the Secretary-General In Accordance With Commission Resolution 18, E/CN.4/1314, December 19, 1978; *see also,* J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 44, 80 (1988) ("CAT Handbook"). Moreover, as the Committee's own question indicates that the word "severe" adequately included the concept of "extreme," and the negotiating history of the CAT confirms that use of the word "severe" was sufficient to convey the idea that acts of an extreme gravity were covered by that term. It is also worth noting that the term "extremely severe" would be different from either "severe" or "extreme."

It should also be noted that the original Swedish draft of the CAT also included a provision that highlighted that torture should be distinguished from cruel, inhuman or degrading treatment or punishment by virtue of the more severe, or aggravated nature of the acts involved in torture. Article 1(2) of the original Swedish draft provided that "[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."[2]

---

[2] The negotiating history reflects that delegations differed over the utility of including the provision in Article 1 of the CAT. The presence of the term "cruel, inhuman or degrading treatment or punishment" in Article 1 had been controversial from the beginning of the negotiations, as many had expressed concern over the vagueness of the term and expressed the need to distinguish it from "torture." When the Working Group met in March 1979 some delegates proposed deleting this provision because it unduly restricted the definition of torture. Other delegates disagreed, but believed that deletion wouldn't "prejudge the broader issue of whether subsequent articles of the Convention should apply only to torture or also to other forms of cruel, inhuman or degrading treatment or punishment." *See* Report of the Working Group on A Draft

This approach – distinguishing torture from lesser forms of cruel, inhuman, or degrading treatment or punishment– is consistent with other international law sources. These include the 1975 Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and reflected a distinction between torture and lesser forms of cruel, inhuman or degrading treatment or punishment contained in other international law sources, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and caselaw from the European Court of Human Rights[3] and European Commission on Human Rights and the International Criminal Tribunal for the Former Yugoslavia.[4] This distinction has also been noted by commentators. For example, Burgers and Danelius note that Article 16 implies "that torture is the *gravest form* of [cruel, inhuman or degrading] treatment or punishment."[5] Professor Evans notes that the CAT "formalises a distinction between torture on the one hand and inhuman and degrading treatment on the other by attributing different legal consequences to them."[6]

Additionally, the record of the U.S. ratification deliberations demonstrates the longstanding U.S. view that torture can be distinguished from other forms of mistreatment or abuse by virtue of the severity of the

---

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, E.CN.4/L.1470, 12 March 1979.

[3] *See, e.g., Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978); *Aktas v. Turkey*, No. 24351/94 (E.C.H.R. 2003); *Akkoc v. Turkey,* Nos 22947/93 & 22948/93 (E.C.H.R. 2000); *Kaya v. Turkey*, No. 22535/93 (E.C.H.R. 2000).

[4] *See, e.g., Prosecutor v. Delacic*, IT-96-21, Trial Chamber Judgment ¶542 (ICTY Nov. 16, 1998) ("[I]nhuman treatment is treatment which deliberately causes serious mental and physical suffering that falls short of the severe mental and physical suffering required for the offense of torture.")

[5] J. Herman Burgers a& Hans Danelius, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 80 (1988) (emphasis added).

[6] Malcolm D. Evans, *Getting to Grips with Torture*, 51 Int'l & Comp. L.Q. 365, 369 (2002).

underlying acts. Thus, when the United States Department of State transmitted the CAT in May 1988 to the Senate for its advice and consent to ratification, it explained that "[the CAT] seeks to define 'torture' in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned." It also noted that "'torture' is thus to be distinguished from lesser forms of cruel, inhuman or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture." It further explained that "the requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture*' [and that] the negotiating history indicates that the [italicized] portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind." (Emphasis added in the original.) This analysis was subsequently adopted by the Senate in its report recommending that the Senate consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30 at 13-14. Accordingly, the discussion in the December 2004 memorandum clarifies that the use of "severe" in the definition of torture as ratified by the United States indicates that the Convention defined torture in a relatively limited fashion that involved an intensity not characteristic of less extreme forms of mistreatment or abuse.

4. Please explain why the interpretation of both memorandums seems to be much more restrictive than previous United Nations standards, namely the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, art. 1.2)**, which states that "[T]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment."**

As described above, the interpretation of the term "severe" contained in the December 2004 memorandum reflects the understanding, express in the text of the Convention, that torture constitutes a more aggravated form of abuse than that covered by the "cruel, inhuman or degrading treatment or punishment" described in Article 16 of the CAT.

This is consistent with and is not more restrictive than the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which distinguishes torture from other lesser forms of abuse, in part on the basis of the severity of the underlying acts.

Article 2

5. Considering that the reservation of the State party to the Convention states that the "provisions of articles 1 through 16 of the Convention are not self-executing" (Annex 4 to the report)**, the only legislation that has been enacted to give effect to the Convention was a law giving the United States courts criminal jurisdiction over extraterritorial acts of torture** (See the core document (HRI/CORE/1/Add.49), para. 141 and the initial report (CAT/C/28/Add.5), para 47)**. Is the State party actively considering formally incorporating all the provisions of the Convention into domestic law? If not, how will the State party ensure that its legislative, judicial, administrative and other measures fully meet the obligations of the Convention? What guarantees and controls does the State party have to ensure the monitoring of the activities of law enforcement officials in prisons and other detention centres under the jurisdiction of states of the Union or under its jurisdiction or de facto control?** (De facto control of the State party, means, e.g., territories, or parts of territories, where United States troops are operating under United States command.)

The statement made by the United States regarding the non-self-executing nature of the Convention, which was included in the U.S. instrument of ratification, is a declaration regarding the domestic implementation of the CAT and is not a reservation intended to exclude or modify U.S. rights or obligations under the Convention. It was only necessary to enact legislation regarding the extraterritorial offense of torture in order to fully implement the Convention at the time of our ratification. The reason for this is that at the time of ratification existing United States law fully met the obligations of the United States under the CAT, as clarified by the Reservations, Understandings, and Declaration of the United States. No further legislative changes were required, nor are they required today. Prior to U.S. ratification of the Convention, the United States carefully reviewed U.S. federal and state laws for

compliance with the terms of the CAT. The United States concluded that, with the sole exception of prohibiting certain acts of torture committed outside the territory of the United States, U.S. state and federal law covered all of the offenses stated in the Convention. The United States filled this lone shortcoming by enactment of 18 U.S.C. 2340A, prohibiting certain acts of torture committed outside the territory of the United States.

The United States ensures compliance with its CAT obligations through operation and enforcement of its existing laws. As discussed in paragraphs 16, 44 and 155 of the *Second Periodic Report*, acts which would constitute torture when committed inside the United States are punishable under state or federal criminal law. As the United States has explained before, there is no specific federal crime styled as "torture" for acts occurring within U.S. territory. The reason for this is simply that any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable, for example, as aggravated assault or battery or as mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, or a conspiracy, or a criminal violation of an individual's civil rights. These laws, which meet the requirements of the CAT, are binding on governmental officials and are enforced through a variety of administrative procedures, criminal prosecutions, and civil suits.

With regard to torture, "cruel and unusual punishments" have always been proscribed by the Eighth Amendment to the U.S. Constitution. This Amendment is directly applicable to actions of the federal government and, through the Fourteenth Amendment, to those of the constituent states. *See Robinson v. California,* 370 U.S. 660, *reh'g den.* 371 U.S. 905 (1962); *Estelle v. Gamble*, 429 U.S. 97 (1976). While the constitutional and statutory law of the individual states in some cases offers more extensive or more specific protections, the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the U.S. Constitution, as incorporated by the Fourteenth Amendment to the U.S. Constitution, create a minimum legal protection against the actions of state and local governments. Every state constitution also contains detailed guarantees of individual liberties, in most cases paralleling the protections set forth

in the federal bill of rights. For example, nearly all state constitutions expressly forbid cruel and unusual punishment (including acts constituting "torture") and guarantee due process protections no less stringent than those in the federal Constitution.

Finally, U.S. law provides various avenues for seeking redress, including financial compensation, in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. Besides the general rights of appeal, these can include any of the following, depending on the location of the conduct, the actor, and other circumstances:

- Seeking a writ of habeas corpus, which, in certain circumstances, allows judicial review of whether there is a valid reason for detention;
- Filing criminal charges, which can lead to investigation and possible prosecution. As noted previously and in the response to Question 11, at the federal level, 18 U.S.C. §§ 2340 and 2340A permits the Department of Justice to prosecute any person who, outside of the United States, commits or attempts to commit the crime of torture, which is defined as an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering upon another person within his custody or physical control. Additionally, under 18 U.S.C. § 242, the Department of Justice can also prosecute any person who, under color of law, subjects a victim in any state, Territory, Commonwealth, Possession, or District to the deprivation of any rights or privileges secured or protected by the Constitution or laws of the United States.
- Bringing a civil action in federal or state court under the federal civil rights statute, 42 U.S.C. § 1983, directly against state or local officials for money damages or injunctive relief;
- Seeking damages for negligence of federal officials and for negligence and intentional torts of federal law enforcement officers under the Federal Tort Claims Act, 22 U.S.C. § 2671 *et seq.*, or of other state and municipal officials under comparable state statutes;
- Suing federal officials directly for damages under provisions of the U.S. Constitution for "constitutional torts," *see Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979);

- Challenging official action or inaction through judicial procedures in state courts and under state law, based on statutory or constitutional provisions;
- Seeking civil damages from participants in conspiracies to deny civil rights under 42 U.S.C. § 1985;
- Bringing civil suits for damages for certain acts of torture perpetrated by officials of foreign governments based on international legal prohibitions against torture under the Alien Tort Statute and the Torture Victims Protection Act, 28 U.S.C. § 1350, and note;
- Pursuing administrative remedies, including proceedings before civilian complaints review boards, for the review of alleged police misconduct;
- The federal government may institute civil proceedings under the pattern or practice provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, to eliminate patterns or practices of misconduct by law enforcement officers of any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority. Similarly, the federal government may institute administrative and civil proceedings against law enforcement agencies receiving federal funds who discriminate on the basis of race, sex, national origin, or religion.
- Individuals may bring administrative actions and civil suits against law enforcement agencies receiving federal funding that discriminate on the basis of race, sex, national origin, or religion, under the federal civil rights laws. *See* 42 U.S.C. § 2000d (Title VI) and 42 U.S.C. § 3789d (Safe Streets Act).
- In the case of persons in detention, the federal government may institute proceedings under the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), 42 U.S.C. § 1997, to eliminate a pattern or practice of abuse in any state prison, jail or detention facility.

With respect to the Committee's final question in this paragraph, of all the mechanisms listed above, CRIPA is perhaps the most direct source of the federal government's authority to enforce the federal constitutional rights of persons in jails and prisons at the state and local level. CRIPA authorizes the U.S. Department of Justice ("DOJ") Civil Rights Division ("CRD") to enforce the constitutional and statutory rights of persons confined to state and local institutions, including prisons, jails, and juvenile justice facilities. The federal government's authority to investigate juvenile justice facilities also flows from provisions of Section

14141, which authorize the Attorney General to bring civil actions when administrators of juvenile justice systems engage in a pattern or practice of violating juveniles' federal rights. Federal investigations focus on myriad issues depending on the type of institution and the nature of alleged unconstitutional conditions. Issues include, for example, physical and sexual abuse, medical and mental health care, fire safety, security, adequacy of treatment and training, and, with regard to juveniles, special education services.

Once DOJ enters into an agreement to require reform of a facility, it works vigilantly to ensure compliance. To assess a facility's compliance status, DOJ requests and reviews documents from the facility which demonstrate its degree of compliance. Such documents include written policies and procedures, incident reports, investigative files, and patient records. After reviewing these documents, DOJ conducts on-site facility inspections with teams of consultants. DOJ uses consultants who are subject matter experts, like medical and psychiatric doctors, protection from harm specialists, and penological experts. These consultants accompany DOJ personnel during on-site inspections to conduct interviews of facility staff and inmates, tour the facility, and observe operations. Following the site inspections, DOJ typically provides the facility with a written assessment of its compliance status.

DOJ's process is a collaborative one in which it works with the facility to promptly identify and remediate issues of non-compliance. DOJ's consultants provide technical assistance tailored to address the facility's identified deficiencies. This approach generally brings facilities into compliance. When, however, a facility fails to comply with a consent agreement, DOJ takes enforcement action, such as filing a motion to hold the facility in contempt of court or to appoint a special master to facilitate compliance with the provisions of the decree.

Since 2001, DOJ has concluded formal investigations of 42 jails, prisons, and juvenile facilities. It is currently monitoring agreements involving 97 jails, prisons, and juvenile facilities.

See also the response to Question 29 below.

6. Is the transfer of detainees from one place of detention to another duly registered and is this registrar public? Do foreigners

detained under the jurisdiction of the State party receive any consular assistance? Please provide updated and detailed data regarding the incarcerated population in the State party's territory (Initial report) **and in areas under the jurisdiction of the State party, including in Afghanistan, Iraq and Guantánamo Bay** (Annex 1 to the report, pp. 50 and 71)**. Regarding the latter, please provide information on their exact legal status, the offences they are detained for, for what period and the process which determines the length of their detention. Do detainees have access to legal advice, medical treatment and family visits? Is there any independent review of the grounds of detention and their continuing applicability? Please provide detailed information on the matter.**

This question is exceptionally broad. It asks for information concerning persons detained both within and outside the United States. With respect to persons detained in the United States, this question seeks information about persons detained at the federal, state, county and municipal levels. While relevant individual federal, state and local authorities maintain appropriate administrative records relating to such information, the United States does not maintain a unified national database. Consequently, the U.S. response to this question will not be comprehensive.

Registration of Detainee Transfers

The Convention Against Torture has no provision requiring the registration of detainee transfers. The relevant federal, state, and local authorities have their own policies governing how detainee transfers are registered. For example, the Bureau of Prisons' public website (www.bop.gov) contains an Inmate Locator tool that reflects each inmate's current location; if the place of confinement changes because of transfer, the results are reflected via this tool, which is readily available and accessible to the public.

To the extent that this question relates to transfers of detainees outside the United States, the United States takes exception to the premise of the question that the areas outside of the jurisdiction of the United States are within the scope of the Convention.

Consular Assistance

With regard to consular notification and access procedures, such procedures are not a matter that is addressed by the Convention. Under the Vienna Convention on Consular Relations, the United States is obligated to inform foreign nationals arrested or detained within a consular district that they may request consular notification and access. The United States is also party to several bilateral consular conventions that require mandatory notification whenever a national of the contracting State is arrested or detained within a consular district. In most cases (*i.e.*, under the Vienna Convention on Consular Relations), the foreign national then has the option to decide whether to have consular representatives notified of the arrest or detention. In other cases (*i.e.*, countries with mandatory notification bilateral consular treaties), however, the foreign national's consular officials for the district in which the individual is detained must be notified of an arrest and/or detention regardless of the foreign national's wishes. In cases involving mandatory notification treaties, the United States only releases the information necessary to fulfill its treaty obligation. In most cases, our obligation is limited to notice of the arrest or detention and does not include sharing other details.

Data regarding the Incarcerated Population in the United States

As of December 31, 2004, there were approximately 2,267,787 people incarcerated in the United States, of whom 1,421,911 were held in federal and state prisons (not including the 74,378 state and federal inmates incarcerated in local jails), 713,990 in local jails, 102,338 in juvenile facilities, 15,757 in U.S. Territory prisons, 9,788 in facilities operated by or exclusively for the Bureau of Immigration and Customs Enforcement within the Department of Homeland Security, 2,177 in military prisons and 1,826 in Indian country jails.

Persons held in Bureau of Prisons (BOP) custody

As of March 9, 2006, approximately four percent of the Bureau of Prisons' total inmate population (189,025) were in pre-trial detention status (not yet sentenced) and one percent of the population was confined for the Bureau of Immigration and Customs Enforcement. Pre-trial detainees are typically confined in the Bureau's Administrative facilities, which are institutions with special missions, such as the detention of pretrial offenders or the treatment of inmates with serious or chronic

medical problems; some pre-trial inmates are held in jail units located within federal prisons that house sentenced offenders. Generally, unless otherwise specifically noted "policies and standards applicable to persons committed to the custody of the Attorney General or the Bureau of Prisons apply also to pretrial inmates as defined in §551.101" (from Program Statement 7331.04, Pretrial Inmates). For example, pretrial inmates meet with lawyers and have family visits, they are provided with medical care and are allowed to meet with representatives from their respective consulates. Additionally, they are offered the opportunity to participate in institution programs and services in a manner consistent with safety and the orderly running of the institution.

Administrative facilities include Metropolitan Correctional Centers (MCCs), Metropolitan Detention Centers (MDCs), Federal Detention Centers (FDCs)--all of which are jail-type facilities, Federal Medical Centers (FMCs), the Federal Transfer Center (FTC), and the Medical Center for Federal Prisoners (MCFP). Administrative facilities are capable of holding inmates in all security categories. Federal jails (MCC's, MDC's and FDC's) are located in Honolulu, HI; Houston, TX; Miami, FL; Oakdale, LA; Philadelphia, PA; Seattle, WA; Brooklyn, NY; Guaynabo, Puerto Rico; Los Angeles, CA; Chicago, IL; New York, NY; and San Diego, CA. The Bureau also contracts with privately-managed facilities, and to a lesser extent, state or local facilities, to manage its population.

Internally, the Bureau of Prisons uses an online, real-time, inmate database system that maintains detailed information about each inmate. This system, known as Sentry, provides the official count of inmates at each BOP site, and it enables the Bureau to maintain proper custody of inmates, as well as keep information regarding sentence computations, programs, and assignments. A public record of inmates' (including detainees') locations is available on the internet at the Bureau of Prisons's public website (www.bop.gov) which contains an Inmate Locator tool that reflects each inmate's current location. If place of confinement changes because of transfer, the results are reflected via this tool, which is readily available and accessible to the public.

Persons held in Department of Homeland Security Custody

The Department of Homeland Security (DHS) oversees two component agencies that are charged with securing the borders and enforcing the immigration and customs laws. U.S. Immigration and Customs Enforcement (ICE) handles interior enforcement, while U.S. Customs and Border Protection (CBP) generally handles enforcement at the borders. Agents of both component agencies possess investigation, arrest, and detention authority.

U.S. Immigration and Customs Enforcement (ICE) is currently budgeted on an annual basis to detain an average of 20,800 detainees per day. Approximately 250,000 aliens enter into ICE custody during any given year, with various lengths of stay. The detained population consists of individuals who are currently in proceedings to determine whether they are to be removed from the United States, as well as those who have been ordered removed from the United States and are awaiting travel documents or arrangements to be made to effect their removal. The Office of Detention and Removal Operations (DRO) within ICE keeps electronic records of all transfers, but those records are not publicly available.

U.S. Customs and Border Protection (CBP) apprehends aliens who attempt unlawful entry between ports of entry and aliens denied entry at official ports. As such, its facilities are only for the temporary holding of persons awaiting return abroad or transfer to detention facilities. In the course of its responsibilities securing the U.S. borders, CBP Border Patrol maintains custody of persons who are apprehended as they illegally cross the border as well as persons who are refused entry into the United States. Such custody is temporary in nature, and lasts only until such persons may be transferred to another detention agency or until they are removed or voluntarily depart from the United States. In 2005, Border Patrol maintained temporary custody over 1.2 million apprehended aliens and maintained custody over 500,000 inadmissible aliens at ports of entry. Every effort is made by CBP to transfer, transport or release detainees in custody as quickly as possible, both at Border Patrol stations and at ports of entry. Both ports of entry and Border Patrol stations maintain records, according to local procedures, of the disposition and transfer of custody of detainees to other agencies (ICE's DRO or the Department of Health and Human Service's Office of Refugee Resettlement for unaccompanied juvenile aliens) or release of

the individual from custody. Once transferred to another responsible agency, any further record of transfer is under that agency's authority.

Persons held under Department of Defense Control

With respect to persons under the control of the United States Department of Defense (DoD), detainees are accounted for fully as required under DoD policies. Detainees under the control of the Department of Defense are issued an internment serial number, or "ISN," as soon as practicable, normally within 14 days of capture.

Because of operational security considerations, public disclosure of transfers or releases from DoD control are not announced publicly until the movement of detainees from DoD control is completed. As explained in the response to Question 13 below, although not required by the CAT for persons outside of U.S. territory, the U.S. government will not transfer an individual to a country where it is more likely than not that the individual will be tortured.

Operational Demographics for Department of Defense Detainees

As of February 20, 2006, the Department of Defense holds approximately 490 detainees at its facilities in Guantanamo Bay, Cuba; approximately 400 detainees at its facilities in Afghanistan; and approximately 14,000 detainees at its facilities in Iraq.

Basis, Classification, and Legal Status

Individuals detained by the Department of Defense in Afghanistan and at Guantanamo are held pursuant to the Order of the President of the United States of November 13, 2001 (Federal Register: November 16, 2001 (Volume 66, Number 222), Page 57831-57836). This Order was discussed in the Annex to the *Second Periodic Report*. In addition, the classification of their legal status, the basis for their detention, and their expected duration of detention, is further described in the Memorandum of the President of the United States, February 7, 2002. This memorandum is discussed at length on pages 53 and 54 of the Annex to the *Second Periodic Report*.

With respect to individuals detained at DoD detention facilities in Iraq, as discussed at length on pages 74-76 of the Annex to the *Second Periodic Report*, individuals in Iraq are detained as part of the ongoing military operations conducted by Multinational Forces Iraq (MNF-I). As an update to that information, it should be noted that the United Nations Security Council, on November 11, 2005, decided to extend the relevant provisions of UNSCR 1546 in issuing UNSCR 1637 until December 31, 2006.[7]

Conditions of Detention

The standard for conditions under which detainees detained by the Department of Defense in Afghanistan and at Guantanamo are to be held, including their access to medical care, is set forth in the Memorandum of the President of the United States, February 7, 2002. Further, with respect to detention operations at Guantanamo Bay, Cuba, the United States would redirect the Committee's attention to pages 61-62 of the Annex to the *Second Periodic Report*, and with respect to the conditions of detention in Afghanistan, to page 62 of the Annex to the *Second Periodic Report*. Similarly, the conditions of individuals detained at DoD detention facilities in Iraq is discussed at length on pages 74-76 of the Annex to the *Second Periodic Report*.

Medical Care

The United States recognizes that medical care is an important part of ensuring the safe and humane detention of individuals under its custody. The United States therefore considers it appropriate to describe to the Committee the measures taken to ensure adequate medical care for detainees. While the information provided herein relates to medical care for detainees at Guantanamo, applicable Department of Defense policy on medical care for detainees[8] governs Department of Defense operations worldwide. Further information is provided at Annex 1 to these answers.

---

[7] *Available at* http://daccessdds.un.org/doc/UNDOC/GEN/N05/592/77/PDF/N0559277.pdf?OpenElement (visited April 28, 2006)

[8] Assistant Secretary of Defense (Health Affairs) Policy 05-006, Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the

Status Review Processes

Processes available to review the status of detainees at Guantanamo, potentially resulting in their release or transfer, are described in detail at pages 54-62 of the Annex to the *Second Periodic Report*. With respect to Afghanistan, those processes are described on page 57 of the Annex to the *Second Periodic Report*. With respect to Iraq, these processes are described at pages 71-72 of the Annex to the *Second Periodic Report*.

Access to Counsel

As described in the subsection II(g) of Annex I of the *Second Periodic Report*, detainees who have filed habeas corpus claims in the U.S. federal courts have access to counsel.

7. **According to information before the Committee** (Report of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/2005/65), para. 364)**, the State party has established secret detention facilities, including on-board vessels, and holds unacknowledged detainees with no access to the International Committee of the Red Cross (ICRC), no notification of families, no oversight with regard to their treatment, and in most cases no acknowledgement that they are even being held. Please provide a list of all detention facilities where detainees are being held under the de facto effective control of the State party's authorities** (Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland - Dependent Territories (CAT/C/CR/33/3), para. 4 (b))**, outside its territory or on State party vessels, as well as information on the number, nationality, charges against and exact legal status of these persons. Why have such secret detention facilities been established? Does the State party assume responsibility for alleged acts of torture perpetrated by its own public agents outside its territory but in territories under its jurisdiction or de facto control** (See note 12)**, as well as in cases where**

Custody of the Armed Forces of the United States) (June 3, 2005), *available at* http://www.ha.osd.mil/policies/2005/05-006.pdf.

those acts are perpetrated by persons who are not public agents but are subject to the control of the State party?

As a preliminary matter, we would note that the customary law of armed conflict does not require States to provide the ICRC with access to unlawful combatants who are in their custody. Even where the Geneva Conventions apply, those conventions specifically acknowledge that, where a Party to the conflict is satisfied that an individual protected person on its territory is definitely suspected of or engaged in activities hostile to the security of the State, such persons are not entitled to the rights and privileges afforded by the Convention as would be prejudicial to the security of the State. Similarly, in occupied territory, where an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication with the outside world because they pose a security threat. Of course, in all cases, such persons must be treated with humanity.

Moreover, it is the policy of the United States not to comment on allegations of intelligence activities.

However, the U.S. government is clear in the standard to which all entities must adhere. As noted in paragraph 7 of the *Second Periodic Report*, all components of the U.S. government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment, as defined in U.S. law. The U.S. government does not permit, tolerate, or condone unlawful practices by its personnel or employees under any circumstances. As already noted, 18 U.S.C. §§ 2340 & 2340A make it a crime for a person acting under the color of law to commit, attempt to commit, or conspire to commit torture outside the United States. In addition, pursuant to the Detainee Treatment Act of 2005, the prohibition on cruel, inhuman, and degrading treatment or punishment applies as a matter of law to protect any persons "in the custody or under the physical control of the United States Government, regardless of nationality or physical location."

8. In view of the numerous allegations of torture and ill-treatment of persons in detention under the jurisdiction of the State party and the case of the Abu Ghraib prison, what specific measures have been taken to identify and remedy problems in the command and operation of those detention facilities under the jurisdiction of the State party? What measures have been undertaken to ensure that the ICRC has appropriate access to all such facilities and to all detainees, and that its reports are made known to sufficiently senior members of the chain of command for purposes of implementation?

While the United States is aware of allegations of torture and ill-treatment and takes them very seriously, it disagrees with the suggestion that such practices are widespread or systematic. These allegations must be placed in context: they relate to an extremely small percentage of the overall number of persons in detention. Moreover, it is obvious that not all allegations reflect actual abuse. For example, it is well-known that the Al Qaeda Manchester training manual instructs all Al Qaeda members to allege torture when captured, even if they are not subjected to abuse. Of course, where allegations are well-founded, the United States deplores the abuse and takes action.

Examples of specific measures taken in response to alleged abuses are provided in the *Second Periodic* Report. Section III(B) of Part One of the Annex provides extensive information about specific measures taken in response to alleged abuses at DoD detention facilities in Afghanistan and Guantanamo Bay, Cuba. Section III(B) and V of Part Two provide details about specific measures taken in response to the shocking events of Abu Ghraib in Iraq.

With respect to access and information provided by the International Commiteee of the Red Cross (ICRC), the ICRC has access to every detainee at DoD facilities worldwide, including at Guantanamo and in Iraq and Afghanistan, and may meet privately with detainees under DoD control. DoD accounts for detainees under its control fully and provides notice of detention to the ICRC as soon as practicable. The policy of the Department of Defense is to assign an internment serial number (ISN) and register detainees with the ICRC as soon as practicable, normally within 14 days from capture.

The ICRC transmits its confidential communications to senior officials in the Department of Defense, including military commanders in Afghanistan, Iraq, and Guantanamo, and to other senior officials of the United States Government. The Department of Defense has established procedures to ensure that ICRC communications are properly routed to senior leadership and acted upon in a timely manner. The Department of Defense works with the ICRC to identify and correct matters of concern that come to light. Although our dialogue with the ICRC is confidential, we take seriously the matters the ICRC raises and have made changes and improvements based on its recommendations. Representatives of the ICRC meet routinely with DoD and other U.S. government officials to discuss detention issues. We value the relationship between the U.S. government and the ICRC, and DoD officials will continue to discuss detention issues with the ICRC.

9. Under the State party's domestic law, is it possible to derogate from the principle of the absolute prohibition of torture? Have any measures taken by the State party derogated from this prohibition? Can any provision of the Patriot Act of 2001 be interpreted as a possible derogation? What legal or administrative measures has the State party put in place to ensure that the Convention's prohibition against torture is not derogated from under any circumstances?

Under U.S. law, there is no derogation from the express statutory prohibition on torture. Nothing in the Patriot Act can be read to be a derogation from this prohibition. The legal and administrative measures undertaken by the United States to implement this prohibition are described in detail in the *Initial Report* and the *Second Periodic Report*.

10. Please comment on information transmitted to the Committee that criminal responsibility of perpetrators of torture may be waived under the President's authority as Commander-in-Chief. Does the State party attribute to any person the right to authorize torture or ill-treat anyone under any circumstances? If so, to whom? How is such an authorization compatible with article 2 of the Convention? Has there been an independent investigation regarding the possible responsibility of the high-ranking officials of the Administration, including the CIA, the Department of Defense, the Department of Justice and the Armed Forces, for authorizing or consenting in any way, including through the issuance of orders or guidelines, to acts

committed by their subordinates, especially during the interrogation of detainees, which could be considered as acts of torture?

As noted in Section III(B)(1) of the Annex to the *Second Periodic Report*, concerns such as those cited by the Committee were generated by the August 2002 Memorandum prepared by the Office of Legal Counsel at the U.S. Department of Justice, on the definition of torture and the possible defenses to torture under U.S. law. As described also in response to Questions 1 and 2 above, the 2002 Memorandum was withdrawn on June 22, 2004 and replaced with the December 2004 Memorandum.

The December 2004 Memorandum stated that it "supersede[d] the August 2002 Memorandum in its entirety" and clarified that "[b]ecause the discussion in that [August 2002] memorandum concerning the President's Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."[9]

Under Article 2 of the CAT, "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture." Moreover, under Article 2, "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The United States stands by these obligations under the CAT. As noted in paragraph 6 of the *Second Periodic Report*, the United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority may be invoked as a justification or defense to committing torture under the CAT. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the U.S. government.

---

[9] Memorandum for James. B. Comey, Deputy Attorney General, *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004) at 2.

With regard to investigations conducted by the Department of Defense, the Department has conducted numerous investigations into all aspects of its detention operations following the events of Abu Ghraib. It has conducted over 12 major reviews and continues to examine this issue. Further, the United States refers the Committee to Section III(B)(1) of the Annex to the *Second Periodic Report* which describes in detail the reviews and investigations that have already occurred. Of particular relevance to the Committee's question is the citation to the testimony of Vice Admiral Church to the U.S. Senate Armed Services Committee that after his lengthy investigation – the broadest review of interrogation policies to date – he had concluded that "clearly there was no policy, written or otherwise, at any level, that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that, in fact, occurred."[10]

In addition, U.S. policy regarding the care and treatment of detainees under its control is clear. Alberto Gonzales, then Counsel to the President, stated: "The administration has made clear before and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the torture conventions or the torture statute, or other applicable laws. . . . [L]et me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable."[11]

11. Can an order from a superior be invoked as a justification of torture? Please indicate the appropriate legal measures in place to ensure this does not occur. Are there any circumstances, such as

---

[10] *Id.* [DoD: need full citation of transcript cited in CAT Annex].

[11] *Id.* (citing Press Briefing by White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell'Orto and Army Deputy Chief of Staff for Intelligence General Keith Alexander, June 22, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html>).

"necessity", "self-defence", "superior orders", or any other principle, which can be invoked as a defence for those who torture or ill-treat detainees?

As noted above in response to Question 10, the United States adheres to its obligation under Article 2 of the CAT that "[a]n order from a superior officer or a public authority may not be invoked as a justification of torture," under the CAT.

The CAT requires a State to "ensure that all acts of torture are offences under its criminal law." Every act of torture within the meaning of the CAT, as ratified by the U.S. Senate, is an offense under U.S. criminal law. The U.S. Constitution and numerous state and federal criminal laws prohibit conduct that amounts to torture within the United States. The extraterritorial criminal torture statute, 18 U.S.C. §§ 2340-2340A, also makes it a crime for any person outside the United States to commit, attempt to commit, or conspire to commit torture under the color of the law. If it appears that the criminal laws have been violated, then those violations are investigated and prosecuted as appropriate by the relevant authorities.

Under Article 2 of the CAT, "An order from a superior officer or a public authority may not be invoked as a justification of torture." Moreover, under Article 2, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The United States stands by these obligations under the CAT. The U.S. government is committed to investigating and holding accountable those who engage in acts of torture or other unlawful treatment of detainees. With regard to any defenses for "ill-treat[ment]" of detainees, Article 2 of the CAT does not address such matters, and it is not clear to us what other provision of the CAT the question might be based on.

12. Have the several versions of interrogation rules, instructions and methods, specially regarding persons suspected of terrorism, that have been adopted been consolidated for civilian and military use, especially for the CIA and the military intelligence services? Are persons detained outside the State party, but under its jurisdiction, protected by the same norms regarding interrogation rules, instructions and methods?

The Detainee Treatment Act of 2005, enacted December 30, 2005, prohibits cruel, inhuman, and degrading treatment or punishment and applies as a matter of law to protect any persons "in the custody or under the physical control of the United States Government regardless of nationality or physical location." The Act further provides that "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."[12]

As required under the law, only those interrogation techniques authorized by and listed in the United States Army Field Manual on Intelligence Interrogation are authorized for the interrogation of detainees under the control of the Department of Defense personnel, without regard to whether interrogations are conducted by military or civilian interrogators. The Department of Defense issued on December 30, 2005, specific instructions notifying every Command of this requirement, as well as all DoD Components and field activities.

The question also asks about any interrogation rules, instructions, and methods that may have been adopted by the CIA. As already noted, the United States does not comment publicly on alleged intelligence activities. But, as also already noted, any activities of the CIA would be subject to the extraterritorial criminal torture statute and the Detainee Treatment Act's prohibition on cruel, inhuman, or degrading treatment or punishment.

Article 3

13. Please provide detailed information on the provisions implementing article 3 of the Convention in domestic law and on the

[12] Detainee Treatment Act of 2005, H.R. 2863, Title X, Section 1002(a). Section 1002(b) provides that "[s]ubsection (a) shall not apply with respect to any person in the custody or under the effective control of the Department of Defense pursuant to a criminal law or immigration law of the United States."

procedures, including judicial remedies, to ensure that it is implemented in practice, including in respect of persons under the jurisdiction of the State party outside its territory. Have any decisions prohibiting expulsion, refoulement or extradition to another State under article 3 of the Convention been revoked? Are any categories of foreign persons considered as having committed a crime or suspected of having committed a crime automatically excluded from the protection of article 3 of the Convention?

As stated in paragraph 38 of the *Second Periodic Report*, the United States remains committed to complying with its obligations under Article 3 of the CAT by providing protection to all aliens in its territory who require such protection. The United States' implementing laws and regulations do not exclude categories of persons from protection from refoulement under Article 3. The United States may not revoke or terminate protection under Article 3 from involuntary removal to a particular country so long as it continues to be shown that the protected individual would more likely than not be tortured in that country.

As explained in paragraph 30 of the *Second Periodic Report*, the United States does not transfer persons to countries where it determines that it is "more likely than not" that they would be tortured. This applies to all components of the U.S. Government.

In both the *Initial Report* and the *Second Periodic Report*, the United States provided detailed information on the implementation of Article 3 in the immigration removal and extradition contexts. In these respective contexts, regulations permit aliens to assert Article 3 claims as a defense to either removal or extradition. The regulations of the Department of Homeland Security ("DHS") that provide for the implementation of Article 3 in the immigration removal context and the regulations of the Department of State ("DOS") that provide for the implementation of Article 3 in the extradition context were provided in the *Initial Report*, were cited in the *Second Periodic Report*, and are referenced again in Annex 2.

Removal context

With respect to Article 3 claims raised in removal proceedings, paragraphs 32-38 of the *Second Periodic Report* describe how such

claims are considered. Paragraph 32 of the *Second Periodic Report* describes how individuals may assert Article 3 claims before immigration judges within the Department of Justice's Executive Office for Immigration Review ("EOIR"), whose decisions are subject to review by the Board of Immigration Appeals, and ultimately, to review in U.S. federal courts. For further information regarding appeals of such claims, please see the response to Question 15 below. In cases involving individuals who are subject to criminal- or security-related exceptions, CAT protection from refoulement is still available, known as "deferral of removal." *See* 8 CFR §§ 208.17, 1208.17.

The regulations implementing Article 3 of the CAT in the immigration removal context are publicly available on the Internet and well-known to attorneys representing aliens in removal proceedings. The statutes and regulations governing removal proceedings before an immigration judge provide for ample process, such as the right to representation by counsel of the alien's choosing (at no expense to the Government), 8 U.S.C. § 1229a(b)(4)(A); 8 C.F.R. §§1003.16, 1240.3, 1240.10(a); competent, impartial interpretation of the immigration proceedings, 8 C.F.R. §§1003.33, 1240.3; and a reasonable opportunity to examine and object to evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the U.S. government, 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a). Additional process rights are discussed in response to Question 15.

Generally, an alien applying for protection from removal under Article 3 has the burden of proving that he is more likely than not to be tortured in the designated country or countries of removal. *See* 8 C.F.R. § 1206.16(c)(2). In assessing whether it is "more likely than not" that an applicant would be tortured if removed to the proposed country, all evidence relevant to the possibility of future torture is required to be considered, including, *inter alia*, (1) evidence of past torture inflicted upon the applicant; (2) a pattern or practice of gross human rights violations within the proposed country of removal; and (3) other relevant information regarding conditions in the country of removal. 8 C.F.R. § 1208.16(c)(3). The evidence concerning the likelihood of torture must be particularized to the applicant's circumstances. *See Matter of M-B-A-*, 23 I&N Dec. 474 (BIA 2002).

If the immigration judge determines that an alien would more likely than not be tortured in the country of removal, the alien is entitled to protection consistent with Article 3. 8 C.F.R. § 1208.16(c)(4). The protection afforded will be in the form of withholding of removal or deferral of removal. Aliens subject to the national security, criminal, or related grounds for exclusion from eligibility for withholding of removal, *see* 8 U.S.C. § 1231(b)(3)(B), will receive only deferral of removal. *See id.*

In light of the categorical prohibition contained in Article 3, the United States does not "revoke" Article 3 protection from removal to a particular country for an individual who has been granted such protection as long as it is "more likely than not" that the individual would be tortured in that country. The removal regulations contain procedures for terminating Article 3 protection when substantial grounds for believing the alien would be tortured if removed to a particular country no longer exist. *See* 8 C.F.R. §§208.17(d)-(f), 1208.17(d)-(f), 1003.2, 1003.23. In addition an alien granted such protection may be removed to a third country where there are no substantial grounds for believing that the alien will be subjected to torture, an action that is fully consistent with Article 3 of the Convention. (*See* 8 C.F.R. §§ 208.16(f), 208.17(b)(2), 1208.16(f), 1208.17(b)(2).) Finally, in a small number of appropriate cases an alien who has been granted Article 3 protection may nevertheless be removed to the country from which he was originally granted protection against removal if the United States has obtained assurances it deems credible from the country of proposed removal that the alien would not be tortured if removed there. *See* 8 C.F.R. §§208.18(c), 1208.18(c). In such a case, action would be based upon the judgment of the United States that, with this assurance, it is no longer more likely than not that the person would be tortured.

In exceptional cases where an arriving alien is believed to be inadmissible on terrorism-related grounds, Congress has authorized alternate removal procedures in limited circumstances that do not require consideration or review by EOIR. *See* 8 U.S.C. § 1225(c). The implementing regulations provide that removal pursuant to section 235(c) of the Act shall not proceed "under circumstances that violate Article 3 of the Convention Against Torture." 8 C.F.R. § 235.8(b)(4); *see also* 8 C.F.R. §§ 208.18(d), 1208.18(d). The statutory and regulatory framework for expedited removal proceedings under 8 U.S.C. § 1225(c)

is more streamlined than the general process for alien removal under 8 U.S.C. § 1229a. The regulatory process, however, ensures that the final decision to remove an arriving alien under 8 U.S.C. § 1225(c) is made at a senior level within DHS. In terms of assessing whether the proposed removal would be consistent with Article 3 of the CAT, consideration would be given to relevant evidence, including but not limited to evidence of past torture suffered by the alien, whether there is a pattern or practice of gross human rights violations in the proposed country of removal, and other information bearing upon conditions in the designated country or countries of removal.

Extradition context

The procedures for evaluating Article 3 claims in the extradition context are discussed in detail in paragraphs 39—43 of the *Second Periodic Report*. The regulations of the Department of State ("DOS") at 22 C.F.R. Part 95, which DOS promulgated pursuant to section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, outline the procedures for considering the question of torture when the Secretary of State determines whether a fugitive will be extradited. Whenever allegations relating to torture are brought to DOS's attention by the fugitive or other interested parties, appropriate policy and legal offices within DOS with regional or substantive expertise review and analyze information relevant to the particular case in preparing a recommendation to the Secretary. DOS's Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports, is a key participant in this process. The views of the relevant regional bureau, country desk, or U.S. Embassy also play an important role in DOS's evaluation of torture claims, because its regional bureaus, country desks, and Embassies are knowledgeable about matters such as human rights, prison conditions, and prisoners' access to counsel, in general and as they may apply to a particular case in a requesting State.

DOS will consider information concerning judicial and penal conditions and practices of the requesting State, including the Department's annual Human Rights Reports, and the relevance of that information to the individual whose surrender is at issue. The Department will examine materials submitted by the fugitive, persons acting on his behalf, or other interested parties, and will examine other relevant materials that may come to its attention.

In determining whether a fugitive will be extradited, the Secretary of State must determine whether it is more likely than not that the particular fugitive will be tortured in the country requesting extradition. Based on the analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State or to deny surrender of the fugitive. Or, in some cases, the Secretary might condition the extradition on the requesting State's provision of assurances related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment, such as that the fugitive will have regular access to counsel and the full protections afforded under that State's constitution or laws. Whether such assurances are sought is decided on a case-by-case basis. In several cases in recent years, the Secretary signed a warrant only after the Department engaged in a diplomatic dialogue and received adequate assurances of humane treatment from the requesting State. See response to Question 18 below for further information describing when diplomatic assurances are pursued and how they are evaluated.

The DOS regulations governing Article 3 claims are publicly available and well-known to attorneys representing fugitives in extradition proceedings. Fugitives may submit whatever documentation they consider relevant for consideration of their claims. The decision of the Secretary of State regarding any claims for protection under Article 3 of the CAT is not subject to judicial review, consistent with U.S. law and practice governing extraditions.[13] The "rule of non-inquiry" leaves to the

[13] The issue of whether federal courts in the United States can consider an extradition fugitive's claims under the Torture Convention was litigated in *Cornejo-Barreto v. Seifert*. A panel of the United States Court of Appeals for the Ninth Circuit concluded that a fugitive facing extradition has a statutory right to judicial review of his claims under the Torture Convention, which attaches not during the extradition or habeas corpus proceedings, but after all the legal avenues are exhausted and the Secretary of State has signed the surrender warrant. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000). A different panel of the Ninth Circuit subsequently rejected this conclusion and, in agreement with the position of the Executive Branch, held that the Secretary of State's determination to extradite a fugitive is not subject to judicial review. *Cornejo-Barreto v. Seifert*, 379 F.3d 1075, 1089 (9th Cir. 2004). A majority of the Ninth Circuit judges voted to rehear the case *en banc*, but prior to the date of the rehearing, the Mexican government withdrew its extradition request pursuant to the dismissal of the Mexican state prosecution that served as the basis for the request.

consideration of the Secretary of State questions regarding the treatment extraditees may receive following their surrender for extradition.

As is the case in the immigration removal context, all fugitives in extradition proceedings in the United States are protected by Article 3 of the CAT. Regarding the Committee's question related to "revocation", as explained above, claims for protection under Article 3 are made by the Secretary of State and are not reviewable. Thus, a decision by the Secretary to prohibit the extradition of a person to another State under Article 3 of the Convention cannot be revoked.

Territorial scope of Article 3

Regarding the Committee's question concerning implementation of Article 3 to persons outside of U.S. territory, the United States, while recognizing that some members of the Committee may disagree, believes that Article 3 of the CAT does not impose obligations on the United States with respect to an individual who is outside the territory of the United States. Article 3 provides that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Neither the text of the Convention, its negotiating history, nor the U.S. record of ratification supports a view that Article 3 of the CAT applies to persons outside the territory of the United States.

On its face, the text of Article 3 speaks of actions taken with respect to persons already present in the territory of a State. Both in the cases of expulsion, the deportation of an individual, and extradition, the transfer of a person pursuant to an extradition treaty to another country for the purpose of prosecution, there is no question that such terms describe conduct taken against individuals within a State Party's territory. Accordingly, if there is any debate at all as to whether Article 3 applies outside the territory of a State Party, it turns on whether the term "return

---

Consequently, the Ninth Circuit dismissed the case as moot and vacated the second panel decision. *Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004) (en banc). . *In Mironescu v. Rice*, 2006 WL 167981 (M.D.N.C. January 20, 2006), a district court followed the first *Cornejo-Barreto* decision. This issue is discussed further in response to Question 18 below.

('refouler')" prohibits the return of persons by a State Party in those circumstances covered by Article 3, regardless of where the officials and the individual benefiting from the protection are located.

In the view of the United States, the meaning of the term "return ('refouler')" contained in Article 3 of the CAT is limited to actions occurring within the territory of a State Party. Construing the same term, "return ('refouler')," as employed in Article 33 of the Refugee Convention, the U.S. Supreme Court found that both the text and the negotiating history of Article 33 "affirmatively indicate that it was not intended to have extraterritorial effect." in Sale vs. Haitian Centers Council, Inc., 509 U.S. 155, 179 (1993). In examining the text of Article 33, the Supreme Court found two aspects of Article 33's text persuasive. The first aspect concerns Article 33(2) of the Refugee Convention, which exempted from Article 33(1)'s non-refoulement protection "a refugee whom there are reasonable grounds for regarding as a danger to the security of *the country in which he is*." As Article 3 of the CAT contains no such limitation, the Supreme Court's discussion of this provision is not relevant to the question at hand.[14] However, the second aspect of the Supreme Court's interpretation of the use of the term "return ('refouler')" in Article 33 of the Refugee Convention and Protocol is relevant to the interpretation of that same term in Article 3 of the CAT. Specifically, the Court found that the legal meaning of the term "return," as modified by reference to the French "refouler" (the English translations of which included "repulse," "repel," "drive back," and "expel"), implied that "'return' means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination." *Id.* at 182. The Supreme Court thereby concluded that the non-refoulement protection contained in the Refugee Convention and Protocol was not intended to govern the conduct of States Parties outside of their national

[14] The Supreme Court made it clear that Article 33(1) was limited to persons within the territory of a State Party, otherwise the interplay between Article 33(1) and 33(2) would have created an "absurd anomaly" whereby "[d]angerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not." The Supreme Court concluded that it was "more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory." *Id.*, at 180.

borders and noted that "[f]rom the time of the Convention, commentators have consistently agreed with this view." *Id.* The Court further examined the negotiating history of Article 33 of the Refugee Convention and concluded that the negotiating history supports the Court's interpretation of Article 33 not to impose obligations on States Parties outside of their territory.[15]

The negotiating history of Article 3 of the CAT confirms the view that the provision was intended to apply to the territory of a State Party, and not to persons who had not yet entered the country. The original Swedish proposal spoke only of expulsion or extradition, and did not employ the term "return ('refouler')." However, when the draft was revised to expand the prohibition to include "return ('refouler')," considerable discussion ensued over the advisability of including the term, including references to ambiguity surrounding the extra-territorial reach of the provision. At no point was there agreement that the term was intended to apply to individuals located outside the territory of a State Party. Additionally, both the text and the negotiating history of the CAT make clear that negotiators used explicit language applying certain provisions of the CAT extra-territorially when they intended those provisions to have extra-territorial effect.[16] The negotiators' failure to do so in Article 3 further confirms that there was no express intent to apply Article 3 extra-territorially.

---

[15] This conclusion was based on a series of statements by delegates of several countries (including Switzerland, the Netherlands, and the U.K.) that indicated that the word "return ('refouler')" did not apply to persons who had not entered the territory of the State Party. Following a statement by the Swiss to this effect, the representative of the Netherlands noted that representatives of several countries supported that view and he "wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33." Noting that there was no objection, the President of the Conference ruled that the interpretation given by the representative of the Netherlands be placed on the record. 509 U.S. at 186 (1993).

[16] *See*, for example, Articles 2(1), 5, 12, 13, and 16.

Finally, the record of proceedings related to U.S. ratification of the CAT demonstrates that at the time of ratification, the United States did not interpret Article 3 to impose obligations with respect to individuals located outside of U.S. territory. When the Secretary of State transmitted the CAT to the Senate for its advice and consent to ratification, the State Department's analysis of Article 3 indicates that it understood that the non-refoulement obligations it was undertaking related to removal or extradition *from* the United States, and not to extraterritorial action by U.S. officials. In the immigration deportation (removal) context, the State Department indicated that the new protection afforded by Article 3 could be implemented by simply extending the protections then-available under U.S. law implementing the Refugee Protocol to "cases of torture not involving persecution on one of the listed impermissible grounds." *See* Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by Unanimous Agreement of the United Nations General Assembly on December 10, 1984, and Signed by the United States on April 18, 1988. Treaty Doc. 100-20, at 6. The State Department explained, "This prohibition applies to expulsion or return of persons *in the United States* to a particular State, and does not grant a right to seek entry or to avoid expulsion to other States." (Emphasis added.) *Id.* By emphasizing that Article 3 of the CAT does not grant a right to seek entry, the State Department thereby indicated its view that Article 3 did not apply to persons who had not yet entered U.S. territory. The State Department's analysis discussed the implementation of Article 3 solely in terms of the authorities of the Attorney General under the Immigration and Nationality Act and of the Secretary of State in cases of surrender pursuant to extradition treaties.[17] This analysis was subsequently adopted by the Senate in its report recommending that the

[17] In fact, when the State Department transmitted the CAT to the Senate for its advice and consent to ratification in 1988, it originally proposed a declaration to this effect. The declaration provided, "The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases." The State Department later withdrew this proposal, but it nevertheless reflects the understanding that Article 3 only applied to cases in which persons who were physically present in the United States were subject to immigration deportation (removal) or extradition proceedings.

Senate provide its advice and consent to ratification of the CAT. *See* S. Exec. Rep. No. 101-30 at 16-17.

Although as a legal matter Article 3 does not impose obligations on the United States with respect to an individual who is outside the territory of the United States, as a matter of policy, the United States does not transfer persons to countries where it believes it is "more likely than not" that they will be tortured. This policy applies to all components of the U.S. Government and with respect to individuals in U.S. custody or control regardless of where they may be detained. In the case of interdictions of migrants at sea, as a matter of policy, in addition to screening individuals for fears of persecution, the United States screens individuals to assess whether it is "more likely than not" that they face torture. This policy finds support, in part, from language contained in section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-227, 112 Stat. 2681-822, which directed that "it shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." Also, as noted in the Annex to the *Second Periodic Report,* with respect to individuals detained by the U.S. Armed Forces at the U.S. Naval Base in Guantanamo Bay, Cuba, after determinations are made that a detainee no longer continues to pose a threat to the U.S. security interests or that a detainee no longer meets the criteria of enemy combatant and is eligible for release or transfer, the United States generally seeks to return the detainee to his or her country of nationality. It is always of a particular concern to the United States in such cases that the foreign government concerned will continue to treat the detainee humanely, in a manner consistent with its international obligations. U.S. policy is not to transfer a person to a country if it is determined that it is more likely than not that the person will be tortured, or, in appropriate cases, that the person has a well-founded fear of persecution and would not be disqualified from persecution protection on criminal- or security-related grounds. The essential question in evaluating government assurances is whether the competent U.S. government officials believe it is more likely than not that the individual will be tortured in the country to which he is being transferred. If a case were to arise in which the assurances obtained from the receiving government are not sufficient when balanced against treatment concerns, the United

States would not transfer an individual to the control of another government unless the treatment concerns were satisfactorily resolved.

Finally, in those exceptional cases where the United States conducts renditions of individuals, the United States does not transport anyone to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

14. Does the reservation of the State party to article 3 of the Convention restrict or change the protective scope of this provision? Please explain the practical differences between article 3 of the Convention and the State party's reservation to article 3 (Para. 33 of the report.)**. How and by whom is the determination that a person is "more likely than not" to be tortured made? Please provide examples, *in abstracto* if necessary.**

This question turns on the meaning of the phrase "substantial grounds." The U.S. understanding made at the time the United States became a State Party to the Convention was made precisely to provide operational content to what is otherwise a somewhat open-ended treaty term.

As an initial matter, contrary to the suggestion made in the question, the United States did not take a reservation to Article 3 of the Convention. Rather, as described in the *Initial Report* and the *Second Periodic Report*, at the time the United States became a State Party to the CAT, then-President Clinton on September 19, 1994 formally signed the U.S. instrument of ratification of the Convention, which contained, *inter alia*, the following understanding:

> [T]he United States understands the phrase 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'

At the time the United States reviewed whether to become a State Party to the CAT, it considered whether to provide more specific definitional content to the phrase "substantial grounds for believing that he would be in danger of being subjected to torture." The reasons for the

understanding entered into by the United States are described clearly in the August 30, 1990 Report from the U.S. Senate Committee on Foreign Relations:

> "Article 3 provides that no State Party shall expel, return, or extradite a person to another State where substantial grounds exist for believing that he would be in danger of being subjected to torture.
>
> Under current U.S. law, an individual may not normally be expelled or returned where his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion". 8 U.S.C. 1253(h)(1). The U.S. Supreme Court has interpreted this provision to mean that a person entitled to its protections may not be deported to a country where it is more likely than not that he would be persecuted. *INS v. Stevic,* 467 U.S. 407 (1984). To clarify that Article 3 is not intended to alter this standard of proof, the following understanding is recommended:
>
> "The United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of Convention, to mean "if it is more likely than not that he would be tortured.""

At the time the United States became a State Party to the CAT, it considered that the standard enunciated in the U.S. understanding was merely a clarification of the definitional scope of Article 3, rather than a statement that would exclude or modify the legal effect of Article 3 as it applied to the United States. As the scope of U.S. obligations under Article 3 are set forth in the understanding quoted above that was contained in the U.S. instrument of ratification, there is no difference between the scope of the standard set forth in the U.S. understanding and the obligations assumed by the United States under Article 3.

With respect to the question of who is the competent authority to make the determinations with respect to Article 3, please see the answers to Questions 13 above and 15 and 17 below and in the discussions of Article 3 in the *Initial Report* and the *Second Periodic Report*.

15. May foreigners who claim the right not to be removed to another State under article 3 of the Convention appeal to the courts against the decision of the Secretary of State? Do asylum-seekers have the right to appeal against removal? Please provide detailed information on any such procedure. Does an appeal against a removal have suspensive effect? Please provide information on the number of appeals filed and their outcome. Does the State party have a list of "safe third countries" for removal? If so, how is it created and maintained?

Regarding the Committee's first question above concerning individual appeals of Article 3 decisions by the Secretary of State to the courts, the United States would like to clarify that the Secretary of State is the decision-maker on Article 3 claims only in the extradition context. As discussed at paragraph 42 of the *Second Periodic Report*, and in response to Question 13 above and Question 18 below, the issue of whether the federal courts in the United States can consider an extradition fugitive's claims under the Torture Convention was litigated in Cornejo-Barreto v. Seifert and additional cases.

Regarding the Committee's question concerning appeal rights for asylum seekers, appeal rights and procedures for aliens in immigration removal proceedings are described in paragraphs 31-37 of the *Second Periodic Report* and in paragraphs 159, 169, 170, 172-174 of the *Initial Report*. Although protection under the 1951 Convention relating to the Status of Refugees is beyond the scope of the Committee's area of responsibility, the administrative and judicial appeals processes are similar for applicants for asylum and applicants for protection from torture. Additional detail is provided below.

Determinations of whether a person more likely than not would face torture if removed are most frequently made in removal proceedings under the immigration laws of the United States. Those determinations are made, in the first instance, by immigration judges within the U.S. Department of Justice, Executive Office for Immigration Review (EOIR), who are appointed by the Attorney General. *See* 8 C.F.R. §§ 1003.0, 1003.1, 1003.14, 1208.16-.18, 1240.11(c); *see also* Foreign Affairs Reform and Restructuring Act (FARRA), Pub. L. No. 105-227, Div. G., Title XXII, § 2242(b), 112 Stat. 2681, 2681-822, codified as note to 8 U.S.C. § 1231 (directing "the heads of the appropriate agencies" to

"prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT], subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention").

With the exception of expedited removal procedures under 8 U.S.C. §1225 described below, an alien seeking protection from removal from the United States under Article 3 of the CAT may appeal an adverse decision of the immigration judge on the alien's CAT protection claim to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 1003.1(b). The BIA is an administrative appellate tribunal within the U.S. Department of Justice. *See generally* 8 C.F.R. § 1003.1 (describing the organization, jurisdiction, composition, and authority of the BIA). Board Members are "attorneys appointed by the Attorney General to act as the Attorney General's delegates in the cases that come before them." 8 C.F.R. § 1003.1(a)(1). The BIA conducts de novo review of questions of law and reviews findings of fact, including findings relating to prevailing human rights practices in the designated country or countries of removal, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3).

At the conclusion of the removal hearing, the alien is provided notice of the opportunity to file an appeal to the BIA. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1003.3(a)(1). The appeal must be filed within 30 days of an immigration judge's decision. 8 C.F.R. § 1003.38(b). Both before an immigration judge and upon appeal to the BIA, the alien may be represented by an attorney or an accredited representative. *See* 8 C.F.R. §§ 1003.16(b), 1003.38(g). The EOIR maintains and provides to *pro se* aliens a list of *pro bono* legal service providers in the locality of the immigration court. *See* 8 C.F.R. § 1003.61-.65. An alien may file a written brief in support of his appeal in accordance with BIA rules and procedures. 8 C.F.R. §§ 1003.3(c), 1003.38(f). Subject to certain time, numerical, and jurisdictional limitations, the alien may also file with the immigration judge or the BIA a motion to reopen removal proceedings based on previously unavailable information concerning changed country conditions that bear materially upon the alien's eligibility for protection from removal under Article 3 of the CAT. *See* 8 U.S.C. § 1229a(c)(6); 8 C.F.R. §§ 1003.2, 1003.23. If an immigration judge denies the motion to reopen, the alien may appeal the denial to the BIA.

The U.S. Department of Homeland Security (DHS) may file a brief in opposition to the alien's appeal. 8 C.F.R. § 1003.3(c)(1). In addition, DHS may appeal to the BIA an immigration judge order granting an alien's application for protection from removal under Article 3 of the CAT. DHS may also request that the Attorney General review a BIA decision concerning an application for protection under Article 3. *See* 8 C.F.R. § 1003.1(h)(1)(iii). DHS, however, may not challenge a BIA or Attorney General decision in the federal courts.

If the BIA dismisses the alien's administrative appeal or denies the alien's motion to reopen, the alien may file a petition for review of the BIA's decision with the appropriate federal court of appeals. *See* 8 U.S.C. § 1252(a)(1), (4). An alien—including an alien seeking to challenge a BIA decision denying his application for protection under Article 3 of the CAT—who is removable by reason of having committed a serious criminal offense may obtain judicial review only of constitutional claims or questions of law raised upon a petition for review with the appropriate court of appeals. 8 U.S.C. § 1252(a)(2)(D); *Enwonwu v. Gonzales*, 438 F.3d 22, 33-35 (1st Cir. 2006). The alien must exhaust his administrative law remedies before EOIR before proceeding to the federal court of appeals. 8 U.S.C. § 1252(d)(1); *Ivanishvili v. United States Dep't of Justice*, 433 F.3d 332, 343 (2d Cir. 2006). If unsuccessful before the federal court of appeals, the alien may file a petition for certiorari with the United States Supreme Court, but there is no appeal as of right to the Supreme Court. Federal law precludes any judicial review of an action, decision, or claim raised under the CAT, except as part of the review of a final order of removal to the extent permitted under the immigration laws. *See* FARRA § 2242(d); 8 C.F.R. §§ 208.18(e); 1208.18(e). The sole and exclusive means for judicial review of any cause or claim under Article 3 of the CAT is through a petition for review filed with an appropriate court of appeals challenging a final order of removal. 8 U.S.C. § 1252(a)(4).

In expedited removal proceedings under 8 U.S.C. § 1225(b), an arriving alien may challenge a determination of a DHS asylum officer that the alien does not have a "credible fear" of torture in the designated country or countries of removal. *See* 8 C.F.R. §§ 208.30(g)(2), 1208.30(g)(2). That challenge lies exclusively with the immigration judge. *See id.*; 8 C.F.R. § 1003.42. A negative "credible fear" determination, if sustained by the immigration judge, cannot be further

appealed to the BIA or to the federal courts. *See* 8 U.S.C. § 1252(a)(2)(A)(iii); 8 C.F.R. §§ 208.30(g), 1208.30(g)(2)(iv)(A). The same is true with respect to "reasonable fear" determinations in the expedited removal procedures under 8 U.S.C. §§ 1228(b) (administrative removal of certain criminal aliens) and 1251(a)(5) (reinstatement of removal for aliens previously removed). *See* 8 C.F.R. §§ 208.31(g), 1208.31(g).

Regarding the Committee's question about whether an appeal against a removal has a suspensive effect, a timely administrative appeal to the BIA of an immigration judge's order of removal does have suspensive effect. An order of removal entered by an immigration judge is not considered to be final until the BIA has affirmed the order or the time for filing an administrative appeal has expired. *See* 8 U.S.C. § 1101(a)(47)(B); *see also* 8 C.F.R. §§ 1003.39, 1241.1. Removal of the alien cannot be effectuated "while the appeal is pending . . . before the [BIA]." 8 C.F.R. § 1003.6(a). The filing of a motion to reopen or motion to reconsider, on the other hand, generally does not have suspensive effect. *See* 8 C.F.R. §§ 1003.2(f), 1003.6(b). The alien, however, may request a stay of removal pending consideration of the motion. *Id.* The filing of a petition for review with a federal court of appeals likewise does not have suspensive effect. To forestall removal pending consideration by the court of appeals, the alien must obtain a stay of removal from the court. *See* 8 U.S.C. § 1252(b)(3)(B) (service of petition for review does not stay removal pending court's decision unless court so orders); *Tesfamichael v. Gonzales*, 411 F.3d 169, 171-76 (5th Cir. 2005). Regarding the Committee's interest in information on the number of appeals filed and their outcome, the United States does not track cases and their outcomes by reference to the CAT.

Regarding the Committee's final questions above concerning "safe third countries" for removal, the United States does not maintain a list of countries that are presumed to be safe for purposes of consideration of claims for protection against persecution or torture. Each protection application is considered on its own merits.

We note, however, that the United States and Canada have entered into a "Safe Third Country Agreement." The Agreement permits the United States, subject to a host of important exceptions, to return to Canada two specific classes of non-Canadian aliens seeking protection

under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol or under the CAT: those attempting to enter the United States from Canada at a land border port-of-entry and those who assert protection claims while being removed by Canada through the United States. Upon return to Canada, the alien's protection claims will be considered under Canadian law. Similarly, certain aliens arriving in Canada from the United States, either at a shared land border port-of-entry, or in transit during removal by the United States, may be returned to the U.S. for consideration of their protection claims under U.S. law.

Under the specific terms of the Agreement, an individual referred by either Canada or the United States to the other country cannot be removed to a third country until an adjudication of the individual's protection claims has been made. The Agreement also provides that an individual returned to the other signatory country by the United States or Canada shall not be removed onward to any other country pursuant to any other Safe Third Country Agreement or regulatory designation.

16. According to information before the Committee, the State party has adopted a policy to send, or to assist in the sending of persons to third countries, either from the State party's territory or from areas under its jurisdiction, for purposes of detention and interrogation. How many persons have been affected by this policy, to which countries were they sent, and what measures have been adopted to ensure that they will not be subjected to torture? Please comment on allegations (Report of the Special Rapporteur on torture (E/CN.4/2004/56/Add.1), paras. 1818-1833) **that persons are detained without charges in certain countries at the request of the State party's authorities.**

The United States does not transport, and has not transported, detainees from one country to another for the purpose of interrogation using torture. The United States has not transported anyone, and will not transport anyone, to a country if the United States believes he or she will be tortured. Where appropriate, the United States seeks assurances it considers to be credible that transferred persons will not be tortured.

As has been stated publicly and in prior responses,[18] the United States does not comment on information or reports relating to alleged intelligence operations. The United States and other countries, however, long "have used 'renditions' to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice." The United States considers rendition "a vital tool in combating international terrorism," which "take[s] terrorists out of action, and save[s] lives."[19] However, as is true with the case of immigration removals and extraditions, described more fully in response to Question 13 and Question 18, the United States acts in accordance with its obligations under the CAT and does not transport individuals to a country when it believes that the individuals would more likely than not be tortured in that country.

17. Are enforced or involuntary disappearances, which can be considered a form of torture, a crime punishable by law in the State party? How does the State party prevent persons removed to another State to be interrogated from disappearing?

As an initial matter, it should be noted that enforced or involuntary disappearances are not synonymous with acts of torture. As noted above, acts of torture are prohibited under United States law and are punishable by law. In addition, U.S. federal and state penal codes proscribe abductions and kidnappings, regulate the release or detention of defendants, and prohibit acts that would constitute an enforced or involuntary forced disappearance.

The United States notes that the non-refoulement protection of Article 3 of the CAT does not explicitly prohibit the return of individuals

---

[18] *See, e.g.,* Secretary of State Condoleezza Rice, Remarks on Her Departure for Europe, Dec. 5, 2005, *available at* <http://www.state.gov/secretary/rm/2005/57602.htm>

[19] *See, e.g.,* Secretary of State Condoleezza Rice, Remarks on Her Departure for Europe, Dec.5, 2005, *available at* <http://www.state.gov/secretary/rm/2005/57602.htm>

to countries where they may face an enforced disappearance.[20] However, during both immigration removal and extradition proceedings, an individual may raise any fears that he or she have regarding forced disappearance. The United States further notes that it also rigorously implements its obligations under the Protocol Relating to the Status of Refugees, including the non-refoulement provisions contained therein.

18. Please provide further information on the procedure used to obtain diplomatic assurances that a person will not be tortured if removed or extradited to another State (Para. 33 of the report)**. Have there been any cases where those assurances were not considered adequate and, therefore, the person was not removed or extradited? Please provide examples, *in abstracto* if necessary. Please provide details of the assurances that must be fulfilled by the receiving country in order for the State party to remove or extradite a person. What monitoring mechanisms are in place to assess if the assurances have been honoured** (Para. 43 of the report)**? Please provide further information on the "rule of non-inquiry" of the Secretary of State** (Para. 41 of the report)**. What purpose does this rule serve?**

The United States described the use of diplomatic assurances in the immigration removal and extradition contexts in paragraphs 33 and 40 of the *Second Periodic Report.* The United States would like to emphasize, as it did in paragraph 33 of the *Second Periodic Report*, that diplomatic assurances are used sparingly but that, in both contexts, assurances may be sought in order to be satisfied that it is not "more likely than not" that the individual in question will be tortured upon return. It is important to note that diplomatic assurances are only a tool that may be used in appropriate cases and are not used as a substitute for a case-specific assessment as to whether it is not more likely than not that a person will be tortured if returned.

[20] The proposed International Convention for the Protection of All Persons From Enforced Disappearance contains an explicit non-refoulement obligation with respect to states who will become States Parties to that Convention (Article 16). Although negotiations on the draft text were completed in 2005, the draft text has not been considered for adoption by the U.N., and has not entered into force.

Decisions by immigration judges in removal proceedings demonstrate that between 2000 and 2004, over 2500 individuals have been granted protection from immigration removal under the protection afforded by regulations implementing Article 3 of the Torture Convention alone. These statistics of course do not include the tens of thousands of persons per year who were granted asylum, and who may have been eligible for protection under Article 3 of the CAT but whose claims for Article 3 CAT protection were never reached because they had already been granted protection from refoulement. In these cases, where protection was granted pursuant to Article 3 by an immigration judge, an individual is afforded protection and on that basis, may lawfully remain in the United States absent the availability of removal to a safe third country consistent with the Article 3 implementing regulations and other applicable laws. In the vast majority of cases where Article 3 of the CAT is at issue, diplomatic assurances are never even considered, let alone pursued.

In those limited cases where diplomatic assurances may be sought, it is difficult to comment on the specifics as decisions are made on a case-by-case basis and the circumstances of the individual cases differ in substantial respects. As we explained in paragraph 33 of the *Second Periodic Report*, the United States reserves the use of diplomatic assurances for a very small number of cases where it can reasonably rely on such assurances that the individuals would not be tortured. In the immigration removal context, regulations at 8 C.F.R. § 208.18(c) set forth a process that the U.S. may use with respect to diplomatic assurances from the country of proposed removal that the alien will not be tortured if removed there. In such removal cases, the United States would carefully assess such assurances to determine whether they are sufficiently reliable to allow the individual's removal consistent with Article 3 of the CAT. The small number of instances in which assurances have been sought reflects the degree of care that goes into this process and the degree to which the United States internally screens cases to secure and obtain diplomatic assurances only in appropriate cases.

In the extradition context, pursuant to Department of State regulations, whenever allegations relating to torture are raised by the fugitive or other interested parties, appropriate policy and legal offices within the Department of State review and analyze the information. Based on such analysis, the Secretary of State may decide to surrender

the fugitive to the requesting State, deny surrender of the fugitive, or condition the extradition on the requesting State's provision of assurances, deemed to be credible by the Secretary of State, related to torture or aspects of the requesting State's criminal justice system that protect against mistreatment, such as regular access to counsel. As is the case in the removal context, whether such assurances are sought in particular extradition cases is determined on a case-by-case basis, fully bearing in mind U.S. obligations under Article 3 of the CAT.

Whether sought in the immigration removal or extradition context, the content and the structure of the assurances will differ depending upon the facts relating to the individual, and the analysis of the country conditions in the receiving State. When evaluating assurances or other information provided by the requesting State, the Department of State will consider the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the requesting State that would provide context for the assurances provided. Department officials may also consider U.S. diplomatic relations with the requesting State when evaluating the substantive reliability of the assurances. For instance, Department officials may make a judgment regarding the requesting State's incentives and capacities to fulfil its assurances to the United States, including the importance to the requesting State of maintaining an effective extradition relationship. Monitoring by the United States (typically U.S. political or consular officers at U.S. embassies overseas) or a third party may also be warranted. As with the issue of assurances, the decision whether to seek a monitoring arrangement is made on a case-by-case basis, based on the circumstances of a particular case, which could include the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive's condition, the ability of such groups or persons to provide effective monitoring, and similar considerations.

If, taking into account all relevant information, including any assurances received, the United States believes that a person more likely than not would be tortured if returned to a foreign country, the United States would not approve the return of the person to that country. There have been cases where the United States has considered the use of diplomatic assurances, but declined to return individuals because the

United States was not satisfied such an assurance would satisfy its obligations under Article 3 of the CAT.

The United States also notes an analogous practice relating to the transfer or repatriation of individuals detained by the U.S. Armed Forces at the U.S. Naval Base in Guantanamo Bay, Cuba, which was described in the Annex to the *Second Periodic Report.*

The "rule of non-inquiry"

The "rule of non-inquiry," mentioned in Paragraph 41 of the *Second Periodic Report*, is a judicial doctrine under which courts of the United States refrain from examining the penal systems of nations requesting extradition of fugitives when considering whether to permit extradition. Rather, such issues are considered by the Secretary of State in making the final extradition decision. The rule of non-inquiry recognizes that, among the three branches of the U.S. Government, the Executive branch is best equipped to evaluate and deal with such issues. The rule of non-inquiry is regularly cited and relied upon in U.S. judicial opinions involving extradition.

Paragraph 42 of the *Second Periodic Report* describes recent developments in U.S. law regarding whether federal courts in the United States can consider an extradition fugitive's claims under the Torture Convention. As an update to that Paragraph, we note that, recently, a district court in the United States has called into question the scope of the rule of non-inquiry in the context of torture claims. *Mironescu v. Rice*, 2006 WL 167981 (M.D.N.C. Jan. 20, 2006). The court decided that it could review the Secretary of State's decision that the Torture Convention did not bar a fugitive's extradition to determine whether the Secretary's decision was "arbitrary, capricious, or not in accordance with law." *Id.* at *10. The court stressed that it would not substitute its opinion for the Secretary's as to whether the fugitive would face torture upon return to the requesting State but, rather, limit its consideration to the question of whether the Secretary did, in fact, consider the fugitive's evidence regarding his claim that he would face torture upon return to the requesting State. *Id.* This decision has been appealed to the U.S. Court of Appeals for the Fourth Circuit.

19. According to information before the Committee, persons have been sent to countries which the State party itself considers not to respect human rights (The State Department's annual Country Reports on Human Rights Practices, http://www.state.gov/g/drl/rls/hrrpt/2004/c14136.htm), **where they have been tortured and ill-treated. Were those cases investigated, and what was the result of the investigations? Are all the State party's agencies, when operating outside the State party's territory, under the obligation to respect the non-refoulement rule? Please explain "extraordinary renditions", the procedures followed and the guarantees extended.**

Insofar as the question on extraordinary renditions is meant to refer to the practice of rendering a person to a place where he or she will be tortured, the United States does not engage in extraordinary renditions. To the extent that the question is meant to refer to rendering persons outside normal extradition procedures, the United States has acknowledged that it, like other countries, has long used procedures in addition to extraditions or other judicial procedures to transport terrorist suspects from the country where they were captured to their home country or to other countries where they can be questioned, held, or brought to justice.

While reiterating its view that Article 3 of the CAT does not by its terms apply to individuals outside of U.S. territory, the United States would also like to emphasize what was stated in paragraph 30 of the *Second Periodic Report*: the United States does not transfer persons to countries where it believes that it is more likely than not that they will be tortured. This policy applies to all components of the United States Government with respect to individuals in U.S. custody regardless of whether they are inside or outside of U.S. territory. For additional information concerning renditions, please see the response above to question 16 and the material cited therein.

With regard to the rest of the question, it is important to emphasize that Article 3 does not *per se* prohibit the return or transfer of individuals to countries with a poor human rights record nor does it apply with respect to returns that might involve "ill treat[ment]" that does not

amount to torture.[21] Rather, the United States understands Article 3 to require that an individualized determination as to whether an individual "more likely than not" will face torture in a particular country. As the United States explained in response to Question 18, if, taking into account all relevant information, including any assurances received, the United States believes that a person more likely than not will be tortured if returned to a foreign country, the United States would not approve the return of the person to that country. The U.S. Government's views on the application of the non-refoulement protection in Article 3 outside of U.S. territory are provided in response to Question 13 above.

Article 4

20. Does torture, under the State party's federal law, constitute a specific type of criminal offence when committed inside the State party (United States Code, Title 18, part I, chapter 113C, para. 2340)**? If so, please provide examples. If not, is the State party actively considering making torture a specific federal crime, if committed inside its territory? How is this lacuna reconciled with the necessity of preventing torture and, specifically, with the obligations of the State party under articles 1, 2 and 4 of the Convention? According to the State party report** (Para. 16 of the report)**, acts of torture "may be prosecuted" as other criminal acts (assault, homicide, kidnapping, rape, etc.). Please explain how and under which other offences acts of torture can be prosecuted.**

As discussed in paragraphs 16, 44 and 155 of the *Second Periodic Report*, all acts which would constitute torture when committed inside the

[21] As far as the United States is aware, the jurisprudence of the Committee is consistent on this point. *See, e.g.*, Communication No. 209/2002, para 6.2 (Denmark) ("The Committee must take into account all relevant considerations, including the existence of ... a consistent pattern of gross, flagrant, or mass violations of human rights[, but such a pattern] does not of itself constitute sufficient grounds for determining whether the person in question would be at risk of [torture]. [T]he aim is to establish whether the individual concerned would be at personal risk of torture.... The risk of torture ... must be 'personal and present.'").

United States are punishable under state or federal criminal law. In this context, the phrase "may be prosecuted," employed in paragraph 16 of the *Second Periodic Report* was intended to express the idea that acts of torture are punishable as crimes.

As the United States has explained before, there is no specific federal crime styled as "torture" for acts occurring within U.S. territory. The reason for this is simply that any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable, for example, as aggravated assault or battery or as mayhem in cases of physical injury; as homicide, murder or manslaughter, when a killing results; as kidnapping, false imprisonment or abduction where an unlawful detention is concerned; as rape, sodomy, or molestation; or as part of an attempt, a conspiracy, or a criminal violation of an individual's civil rights. At the time the United States became a State Party to the CAT, it carefully reviewed the definition contained in Article 1 of the CAT and existing criminal law that would apply with respect to torture occurring within the territory of the United States. It determined that acts falling within that definition were already covered under existing criminal laws. As any conduct which could result in an act of torture under Article 1 of the Convention was and remains criminally prosecutable in every jurisdiction within the United States, there is no need to establish federal jurisdiction over an offense committed in U.S. territory separately styled as "torture." Thus there is no "lacuna" in U.S. law as all acts that would constitute torture under the CAT are crimes in the United States.

Most, if not all, acts which would qualify as "torture" could, provided the torturer was acting under color of law, be prosecuted under 18 U.S.C. § 242 as deprivations of Constitutional rights, such as the rights to be free from unreasonable seizure, to be free from summary punishment or cruel and unusual punishment, and the right not to be deprived of liberty without due process of law. Indeed, as the examples in paragraphs 20 and 21 of the *Second Periodic Report* make clear, 18 U.S.C. § 242 reaches, and the Department prosecutes, many violations which do not rise to the level of "torture."

U.S. compliance with its CAT obligations is assured by the availability of this and other tools described in response to Question 5 above to ensure that individuals are protected from torture and other

serious forms of abuse, and that when violations arise, prosecution at the federal and state level and appropriate remedies are available.

If mental harm rose to the level of cruel and unusual punishment, a prosecution under section 242 could be instituted. In addition, investigations conducted pursuant to CRIPA may reveal conditions in which inmates are subjected to conditions which result in "mental harm." Where such conditions are so egregious as to violate constitutional standards, the Attorney General is authorized to bring suit under CRIPA for injunctive relief. The Department to date has not brought a case, however, where only mental harm, and no physical harm, was present.

21. According to the State party's report (Para. 19 of the report.)**, the Uniform Code of Military Justice includes the offences of cruelty and maltreatment, but does it include the offence of torture? If not, please explain why and how this is compatible with the State party's obligations under article 4 of the Convention.**

Charging of violations of the UCMJ

As explained in the *Second Periodic Report* and in the answer to Question 20 above, any act of torture falling within the Convention's definition, as ratified by the United States, is criminally prosecutable under either state or Federal law. This is also the case in military justice system. As described in the Annex to the *Second Periodic Report*, it is a violation of the UCMJ to engage in cruelty and maltreatment. Further, under the UCMJ, individuals may be charged with acts of assault, maiming, rape and carnal knowledge, manslaughter, murder, and unlawful detention.

Under the UCMJ, individuals may also be charged for violations of U.S. federal criminal statutes, including the extraterritorial criminal torture statute (18 U.S.C. Section 2340 *et seq.*) and provisions relating to the other federal crimes listed in the response to question 20 above.

Furthermore, it is important to emphasize that the United States takes very seriously all violations of the law, including the Uniform Code of Military Justice (UCMJ). Many of the measures taken to hold

individuals responsible for violations are described in paragraphs 75-89 and 116-119 of the Annex to the *Second Periodic Report*.

In addition, the Military Extraterritorial Jurisdiction Act ("MEJA"), as amended, enables the prosecution of U.S. civilians employed by or accompanying U.S. armed forces overseas. Specifically, MEJA enables prosecution of DOD civilian employees (including contractors) overseas in connection with such employment, civilian dependants of service members and DOD employees (including contractors), former service members who committed felony offenses while members of the armed forces overseas, and employees of any federal agency or provisional authority, to the extent that their employment relates to supporting the mission of DOD overseas.

Article 5

22. According to the domestic law of the State party, in what cases do foreigners have penal immunity regarding the crime of torture, including if they are present in the territory of the State party? Considering that there were investigations pending at the date of submission of the report (Para. 50 of the report.)**, have any prosecutions been initiated under the extraterritorial criminal torture statute** (United States Code, Title 18, part I, chapter 113C, para. 2340A.)**? Taking into consideration that the prohibition of torture and conspiracy to torture extends to contractors outside the State party** (Para. 12 of the report.)**, have any contractors been charged with this specific offence?**

There is no "penal immunity" for any person for the crime of torture under U.S. law.

Although there have been no criminal prosecutions initiated under the extraterritorial criminal torture statute to date, there have been prosecutions for offenses occurring outside the United States under other statutory provisions, including the Uniform Code of Military Justice.

Article 10

23. Are the terms of the Convention applicable to the armed forces and other personnel, including contractors, when participating in peacekeeping or other military operations either alone or as part of an internationally authorized contingent? If so, have they been informed of their obligations under the Convention, and which other international human rights instruments apply to them?

Article 10 relates to the education and training of all persons "who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment" about the prohibition against torture.

The education and training of military personnel, including contractors, in this regard, both inside and outside the United States, is detailed in the response to Question 24 below.

24. What educational programmes and information, rules and instructions, and mechanisms of systematic review exist for military personnel involved in the custody, interrogation or treatment of individuals in detention?

There are extensive programs of training and information, rules and instructions, and mechanisms of systematic review that apply to military personnel involved in the custody, interrogation or treatment of detainees. These programs are described at length below. Of course, the United States recognizes that no training program, however extensive, will be able to prevent every case of abuse.

Education programs and information for military personnel, including contractors, involved in the custody, interrogation or treatment of individuals in detention include training on the law of war, which is provided on at least an annual basis (and more frequently as appropriate) for the members of every service and for every person, including contractors, who works with detainees. This extensive training on law of war includes instruction on the prohibition against torture and the requirement of humane treatment and other subjects, including human rights. This training is described in detail in Annex 3.

Rules and instructions regarding the custody, interrogation, and treatment of detainees are described in the Annex to the *Second Periodic*

Report and, among other places in the present document, in the response to Question 26 below.

Mechanisms for systematic review include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits as well as reviews conducted pursuant to unit procedures and by the chain of command. They also include case-specific investigations and overall reviews, including the 12 major Department of Defense reviews of detainee policy described in detail in the Annex to the *Second Periodic Report.*

25. What use does the State party make of private contractors in respect of the operation of detention facilities and the interrogation of detainees, and how is this personnel recruited? According to information before the Committee, human rights training for contractors is non-existent or very limited. Please provide detailed information on their training.

Detention Facilities Subject to the Jurisdiction of the Bureau of Prisons

The Bureau of Prisons holds formal training meetings with private contract providers, and also provides a substantial amount of informal training to contract providers via the contract monitoring process. For example, in 2005 the Bureau conducted two community corrections contractors' trainings that ran concurrently from April 11-15: the Bureau's North Central Region provided training in Sioux Falls, South Dakota, for representatives from all private community corrections contractors in that region, while the Bureau's South Central Region held the same training in Dallas, Texas, for all contractors in that region. Approximately 125-175 participants attended each event. In fact, training of private providers is provided by all agency levels, from the institution all the way to Central Office (the Bureau's headquarters). At Bureau institutions, Volunteer and Contract Coordinators provide training on such issues as diversity management, rights and responsibilities, respect for inmate rights and privacy, appropriate communication and interaction with inmates, and in the case of contractors, on the employee code of conduct.

The Bureau's Director has taken a very active role in communicating his expectations of those contracting with the agency to

provide offender services, and has personally addressed private contract providers at national training meetings sponsored by the Bureau. These training meetings have included discussions of standards of employee conduct, the Bureau's policy of zero tolerance for any type of abuse of inmates, and standards of service and support expected from the private providers.

To further safeguard the rights of inmates placed in privately operated correctional facilities, the Bureau's Statements of Work (SOW) used with contractors include the following provisions:

1. Specification of the contractor's responsibility to provide a working environment that is free from sexual harassment and intimidation in accordance with Title VII of the Civil Rights Act of 1964, as amended. Sexual abuse/assault/misconduct is defined as verbal or physical conduct of a sexual nature directed toward an offender or employee by another offender, employee, or volunteer of the facility.

2. Incorporation in contractor's policy of the prohibition of sexual abuse/assault/misconduct by employees against Federal offenders or other employees.

3. The requirement that the contractor develop and implement a comprehensive staff training program addressing the facility's sexual abuse/assault/misconduct prevention and intervention program. Additionally, written policy, procedure, and practice shall provide that all staff receive such training during employee orientation and on an annual basis as part of the facility's in-service training plan.

Because these are included in the SOW as a contract requirement staff in the Bureau monitor compliance. However, the specifics of the training program are up to the contractor.

In keeping with the Bureau's leadership role in the field of corrections, the Bureau's Director has also addressed standards of conduct and inmate management issues (including their application to private providers) in meetings of the Association of State Correctional Administrators and the North American Association of Wardens and Superintendents, in an effort to promote adoption of best practices in the field.

Department of Homeland Security Contract Detention Facilities

The Department of Homeland Security, through its component agency U.S. Immigration and Customs Enforcement (ICE), operates eight Service Processing Centers (SPCs) for the detention of aliens. These facilities are located in Batavia, New York; Krome, Florida; Aguadilla, Puerto Rico; Port Isabel, Texas; El Paso, Texas; Florence, Arizona; San Pedro, California; and El Centro, California. They service approximately 25% of the ICE detainee population. Certain support services are necessary for the successful operation of the facilities and are acquired through competitive acquisition to include security guard service, food services, maintenance services, transportation and other ancillary services.

ICE frequently enters into intergovernmental service agreements, under which immigration detainees are held in state and local government detention facilities across the country. Due to the transient nature and diversity of the detainee populations managed by ICE, it is necessary to coordinate detention and transportation services across the United States to meet fluctuating detention requirements. As locations for detention needs are identified, ICE partners with local governments who wish to participate in providing local detention services. Approximately 55% of the ICE population is managed through such agreements.

ICE also contracts with private detention facility operators. The contract detention facilities provide additional bed space and service approximately 20% of the ICE detainee population. Contracts are awarded through competitive acquisition procedures and, in addition to housing for detainees, provide for security, food service, health care, and all other necessary requirements to manage the detainee population.

ICE detention management contracts require service providers to meet all guidelines and standards set forth in DHS's National Detention Standards and the American Correctional Association (ACA) Standards for Adult Detention, on which the National Detention Standards are in turn based. (The National Detention Standards are described in paragraphs 126-128 of the *Second Periodic Report* and discussed further in response to Question 45 below.) Private contractors also are required to maintain ACA accreditation during the term of performance.

Prior to commencement of a service contract, all contract detention service providers are required to submit policies, plans and detention operations procedures to ICE for review and approval. Contractors are required to institute a management system that ensures that all written plans, policies and procedures are reviewed by ICE at least annually and updated as necessary. Contract service providers are required to develop and maintain a Quality Assurance Plan that institutes critical, measurable operational performance standards for the treatment of detainees and for the provision of services required under detention contracts.

DRO detention management contracts require all contractors to provide adequate management staff and oversight for the successful performance of detention operations. Contractors are required to submit organizational charts detailing all employees' qualifications, job descriptions, and the structure of authority, responsibility and accountability within each facility staffing structure. ICE requires security background checks on all contract staff prior to performance of their duties within ICE facilities.

Contract service providers are also responsible for supplying adequate training programs to ensure staff competency and fitness for duty. All employees who have regular or daily detainee contact receive 160 hours of training during their first year of employment, at least 40 hours to be completed prior to assignment to any post. Contract detention officers receive at least 40 hours of training each subsequent year of employment. At a minimum, this training covers the following areas: sexual abuse/assault awareness, cultural diversity of detainees, rights and responsibilities of detainees, communication skills, signs of suicide risk, counselling techniques, cardiopulmonary resuscitation (CPR) and first aid, security procedures and regulations, and use-of-force regulations.

ICE, in collaboration with the DHS Office for Civil Rights and Civil Liberties, is developing a computer-based training program, modeled on the National Detention Standards. This training will provide uniform guidance to detention facilities for the detention, safety and well-being of detained aliens, and to ensure consistent treatment and care while in custody. The training program will be made available to the staff, including private contractors, employed at the facilities housing alien detainees.

Training of Contractors and Third-parties accompanying DoD Components

The Department of Defense requires all contractors to comply fully with its rules, regulations, and standards, regarding the humane treatment of detainees and has explicitly required contractors to agree to adhere to these requirements. With respect to all of the specific functions that contractors may perform, it is important to note that the exact nature and composition of non-military personnel accompanying DoD Components does not remain static.

Combatant Commands

The Combatant Commanders must ensure that all contract personnel have been certified by their respective service components. Within the United States Central Command (USCENTCOM), Department of Defense contractor personnel are utilized as linguists, screeners, analysts and interrogators in detention/interrogation facilities throughout the USCENTCOM Area of Responsibility (AOR).

Contactor personnel are recruited by individual businesses through a variety of means, including the use of internet websites to review resumes based on keyword searches and word-of-mouth recruitment. After an initial review of resumes, candidates are contacted to ensure that basic requirements are met for each position. Specific requirements are designated within the Statements of Work for each individual contract. The following are standard requirements for contract interrogators:

- Must have graduated from a DoD approved interrogator training course (97E or service equivalent) or a Federal Law Enforcement Training Center (FLETC) approved interrogator training course.
- At a minimum, must have an interim SECRET security clearance. This requirement means that at a minimum, contract interrogators will be screened for a criminal history, citizenship, and financial risk factors that would indicate poor or compromised judgment.

Upon arrival in the AOR, contractors receive specific training for the local area to ensure adherence to host unit standard operating procedures and policies, as well as a refresher course in detention/interrogation policy, in accordance with the Geneva Conventions, U.S. laws, and U.S. treaties. Much of the training outlined in Annex 3 is applicable to contractors, as stated above.

In the United States European Command (USEUCOM), their regulations prohibit the use of private contractors from participating in interrogations. Also, United States Army Europe (USAREUR) policy prohibits private contractors from participating in any interrogation of detainees in the USAREUR AOR. (AER Supplement 1 to AR 190-8, 3 Nov 04.)

In the United States Southern Command (USSOUTHCOM,)all contractors have the same training requirements as DOD personnel, as outlined above.

Military Departments

Within the Army, the military intelligence community uses contractors as linguists, interrogators, and analysts. Contract linguists, interrogators, and analysts are contracted through mechanisms that prescribe the required qualifications of personnel. The Headquarters of Department of the Army has established a policy on the minimum training requirements for contract interrogators and has incorporated it into the Contract Statement of Work. The contractor has a responsibility for hiring contractors who meet the training requirements established by the Army.

On 11 April 2005, the Secretary of Defense established a policy that all federal employees and civilian contractors engaged in the handling or interrogation of individuals detained by the Department of Defense shall complete annual training on the law of war, including the obligations of the United States under domestic and international law. In addition, all personnel deploying to the Iraq and Afghanistan theaters will

receive Geneva Convention training at U.S. Replacement Centers.[22] In addition, personnel receive periodic training with their units while deployed. This is applicable to all the services.

The Marine Corps does not, as part of its service responsibilities, train contractors. All Marines are trained that they are to report all violations of the law of war; that no torture is allowed or tolerated; that all detainees are protected and extended fair, humane treatment along with food, water, and shelter. Corrections Marines are informed that there may be contract interrogators, and that contractors must follow the law of war. Also, Corrections Marines are taught they are responsible for the custody and safety of detainees, and they should and will not participate in or assist with interrogation(s). Theater combatant commanders have control over what type of contractor support the command currently needs for their current situation/mission. Theater combatant commanders are responsible to provide training to contractors on law of war matters, which include humane treatment as required by the Geneva Conventions.

Article 11

26. Could the use of the word "extreme" in the December 2004 memorandum (*Memorandum for James B. Comey*, op. cit.**) create unnecessary confusion for trainers and personnel, considering that, according to the report by Major General Fay, Lieutenant-General Jones, and General Kerna, "military personnel or civilians appeared to have abused Iraqi prisoners due to … confusing interrogation rules"** (Page 75 of the report (annex 1).**).**

As explained in the Annex to the *Second Periodic Report*, the main finding of the investigation conducted by General Kern, Lieutenant General Jones, and Major General Fay (commonly referred to as the Jones-Fay report) was that a small group of individuals, acting in contravention of U.S. law and DoD policy, were responsible for perpetrating the acts of abuse at Abu Ghraib. Specifically, in an

[22] U.S. Replacement Centers are central locations in the United States, such as Fort Bliss, Texas, for individuals deploying to Iraq and Afghanistan to receive uniforms and additional training and conduct paperwork processing. This process ensures that each individual receives the appropriate training prior to deployment.

interview after the report's release, General Kern told reporters, "We found that the pictures you have seen, as revolting as they are, were not the result of any doctrine, training or policy failures, but violations of the law and misconduct." This finding has been supported in 12 other major reviews conducted by the Department of Defense.

27. Please provide detailed examples of revisions of interrogation rules, instructions, methods and practices after the August 2002 memorandum was superseded by the December 2004 memorandum (Para. 62 of the report.)**. Are there any specific interrogation rules, instructions and methods for specific agencies, or do the same apply to all personnel, including the limits on interrogation techniques? Please provide the Committee with all the interrogation rules, instructions and methods currently applicable.**

On an ongoing basis, the United States reviews and, where appropriate, makes revisions to its interrogation rules, instructions, and methods. For example, with regard to the Department of Defense, pursuant to the Detainee Treatment Act of 2005, the Deputy Secretary of Defense issued Department-wide guidance on December 30, 2005. The Deputy Secretary noted that the President's February 7, 2002 direction that all persons detained by the U.S. Armed Forces in the War on Terrorism shall be treated humanely remains in effect. The Deputy Secretary further directed that consistent with the President's guidance, DoD shall continue to ensure that no person in the custody or under the physical control of the Department of Defense, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. Finally, the Deputy Secretary directed that "effective immediately, and until further notice, no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or interrogation approach that is not authorized by and listed in United States Army Field Manual 34-52, "Intelligence Interrogation, September 28, 1992."

Other U.S. government agencies may also have their own interrogation policies. As already noted, any activities of such other agencies would be subject to the extraterritorial criminal torture statute and the prohibition on cruel, inhuman, or degrading treatment or punishment in the Detainee Treatment Act of 2005.

Article 12

28. Please provide information on the programmes, activities, resources and results of the Civil Rights Division of the Department of Justice.

The Civil Rights Division of the Department of Justice ("CRD") was established in 1957 during the Administration of President Dwight Eisenhower to enforce the Civil Rights Act of 1957 and the criminal civil rights laws enacted during the Reconstruction period that followed the American Civil War. The Civil Rights Act of 1957 was primarily intended to ensure the right to vote of all U.S. citizens. Today, CRD is responsible for enforcing federal statutes prohibiting discrimination on the basis of race, sex, handicap, religion, and national origin.

In addition to enforcing the Civil Rights Act of 1957, CRD also enforces the Civil Rights Acts of 1960, 1964, and 1968; the Voting Rights Act of 1965, as amended; the Equal Credit Opportunity Act; the Americans with Disabilities Act; the National Voter Registration Act; the Uniformed and Overseas Citizens Absentee Voting Act; the Voting Accessibility for the Elderly and Handicapped Act; and additional civil rights provisions contained in other laws and regulations. These laws prohibit discrimination in education, employment, credit, housing, public accommodations and facilities, voting, and certain federally funded and conducted programs.

CRD also enforces CRIPA, described further in response to Question 5 above, which authorizes the Attorney General to seek relief for persons confined in public institutions where conditions exist that deprive residents of their constitutional rights; the Freedom of Access to Clinic Entrances Act, the pattern or practice provisions of the Violent Crime Control and Law Enforcement Act of 1994; and Section 102 of the Immigration Reform and Control Act of 1986, as amended, which prohibits discrimination on the basis of national origin and citizenship status as well as document abuse and retaliation under the Immigration and Nationality Act. In addition, CRD prosecutes actions under several federal criminal civil rights statutes, described in response to Question 5 above, including those prohibiting conspiracy to interfere with Constitutional rights (18 U.S.C. § 241), deprivation of rights under color

of law (18 U.S.C. § 242), interference with federally protected activities (18 U.S.C. § 245), peonage and involuntary servitude (18 U.S.C. §§ 1581-1594), interference with access to reproductive health care (18 U.S.C. § 248), and interference with the exercise of religious beliefs or destruction of religious property (18 U.S.C. § 247).

Finally, CRD is responsible for coordinating the civil rights enforcement efforts of federal agencies whose programs are covered by Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3789d, and Section 504 of the Rehabilitation Act of 1973, as amended, and assists federal agencies in identifying and removing discriminatory provision in their policies and programs.

The chief executive of CRD is the Assistant Attorney General for Civil Rights. The Office of the Assistant Attorney General, which includes Deputy Assistant Attorneys General and several counsels and other staff, establishes policy and provides executive direction and control over enforcement and administrative management activities in the Division. As of December 31, 2005, there were nearly 655 employees of the Division, 340 of whom were attorneys. All Division employees are stationed in Washington, D.C. Nearly all Division attorneys and, occasionally, some paralegal and clerical personnel, are required to travel since litigation activities occur in all parts of the United States in coordination with the nation's various United States Attorneys' Offices. The Division has increased its staffing of criminal prosecutors by 13 percent since 2001 to reflect the expanded responsibilities of the CRD and to maintain vigorous enforcement.

CRD has achieved impressive results over the past five years. Since October 1999, CRD has achieved an impressive level of accomplishments protecting and enforcing the civil rights of all persons, filing 537 criminal civil rights cases against 971 defendants and obtaining 766 convictions to date. This includes 254 cases filed charging 436 law enforcement officers with official misconduct, which have resulted in 359 convictions to date.

In addition to these responsibilities, CRD has been involved in the investigation and prosecution of longstanding civil rights cases. In 2003, the Division successfully prosecuted Ernest Henry Avants for the 40-

year-old murder of an African-American farm worker in Mississippi, and in 2004, spearheaded the formation of a task force to reopen the investigation into the 1955 murder of Emmett Till, a notorious criminal case stemming from the Civil Rights Movement-era. Also of note, the Division's Criminal Section successfully prosecuted two high profile civil rights crimes in 2005 where the defendants were initially acquitted on state charges. In the State of Mississippi, Division lawyers secured a conviction against a former Jackson police officer on civil rights charges relating to the rape of a young woman in police custody. And in the State of Georgia, Division attorneys successfully prosecuted and secured life sentences against two defendants, one a former deputy sheriff, for the murder of DeKalb County Sheriff-Elect Derwin Brown.

In recent years, CRD has further intensified its enforcement activities in the areas of disability rights, voting rights, housing rights, religious liberties, and the rights of institutionalized persons. For example, in 2004 and again in 2005, the Division brought more cases to enforce section 203 of the Voting Rights Act than in the previous 25 years combined. During 2004, the Division also mounted the largest election monitoring program in the Division's history, dispatching more than 1,900 federal personnel to monitor elections around the country. In the past five years, the Division conducted more desegregation case reviews than in the previous five years of the last administration and filed the first case under Title IV of the Civil Rights Act since 1990. In fiscal year 2004, the Division also filed more cases challenging a pattern or practice of employment discrimination than in any year since the mid-1990s. Moreover, the Division filed significant cases against major financial institutions for discrimination in lending; a major public accommodations case against Cracker Barrel Old Country Stores, a nationwide chain of restaurants; the first ever case brought under section 504 of the Rehabilitation Act; and a case where the Division won the highest monetary award by a jury ever obtained by the Department in a suit under the Fair Housing Act.

The steps taken with regard to the rights of the disabled are also significant. CRD has a 16 percent higher success rate in mediation involving disability rights violations than in the previous five years, and the Division has secured nine times the number of favorable court rulings in the same time period. CRD also successfully defended the rights of people with disabilities twice before the United States Supreme Court in

Specter v. Norwegian Cruise Lines,125 S. Ct. 2169 (2005) (finding ADA applies to foreign-flag cruise ships in U.S. waters) and Tennessee v. Lane, 541 U.S. 509 (2004) (finding ADA applies to state courts). In Project Civic Access – a wide-ranging effort to ensure that counties, cities, towns, and villages comply with the ADA by eliminating physical and communication barriers that prevent people with disabilities from participating fully in community life – the Division reached 121 settlement agreements; which represents a 67 percent increase over the comparable prior period. CRD has also created 12,000 new housing opportunities for people with disabilities in fiscal year 2005 alone, which is four times that of the entire eight prior years.

CRD has also brought a substantial number of religious discrimination cases in recent years. For example, in 2004 and 2005, CRD prosecuted three cases alleging patterns or practices of religious discrimination in employment by state agencies. CRD also helped to obtain successful resolutions in 14 cases of religious discrimination in education, through filing suits, investigation and settlement, and participation as amicus curiae before the nation's courts. CRD has also brought cases involving religious discrimination in public accommodations, public facilities, and housing. Under the enforcement of the Religious Land Use and Institutionalized Persons Act of 2000, CRD launched 25 formal investigations, filed three lawsuits, and obtained nine favorable outcomes without litigation in cases involving discrimination against houses of worship.

For more information, please visit http://www.usdoj.gov/crt/crt-home.html.

29. Since October 1999, what has been the outcome of the enforcement of the Civil Rights of Institutionalized Persons Act (Para. 26 of the report.)**? How many investigations ended in prosecution for torture or cruel, inhuman or degrading treatment or punishment, or similar offences? What measures have been taken to improve conditions of detention? Please provide detailed information.**

The Department of Justice has continued its vigorous enforcement of CRIPA, protecting the constitutional and statutory rights of persons confined to state and local institutions, including institutionalized persons with disabilities who reside in nursing homes and others who suffer from

mental illness or developmental disabilities who reside in psychiatric hospitals and other state-operated care facilities. Since October 1999, the Department of Justice has opened 65 investigations covering 79 facilities. The Department of Justice has also entered into 39 settlement agreements, including seven consent decrees. Over the past five years the Department of Justice has initiated 25 percent more new investigations than in the preceding five-year period. In fiscal year 2005 alone, the Department of Justice opened 11 CRIPA investigations; sent nine findings letters; obtained nine agreements involving 12 facilities; entered four consent decrees involving six facilities; and conducted approximately 120 investigatory and compliance tours of facilities. In addition, the Department of Justice is monitoring compliance with court orders that cover persons who previously resided in institutions but who currently reside in community-based residential settings in the District of Columbia, Hawaii, Pennsylvania, Indiana, Puerto Rico, Wisconsin, and Tennessee. As of April, 2006, there are currently 41 active investigations covering 44 facilities.

Pursuant to 42 U.S.C. § 1997f, the Attorney General provides an annual report to Congress describing the Department of Justice's enforcement efforts under the Civil Rights of Institutionalized Persons Act. These reports are available online at: http://www.usdoj.gov/crt/split/findsettle.htm#congrep

With regard to the various means by which acts which would constitute torture under the Convention, as ratified by the United States, are prohibited under U.S. law, we refer the Committee to paragraphs 13-15 and 41 of the United States' *Second Periodic Report*. With regard to "prosecution for . . . cruel, inhuman or degrading treatment or punishment," we refer the Committee to the United States reservation, which explains the extent to which the United States considers itself bound by the obligation to prevent such treatment or punishment. In addition, please see the response to Question 43 below. As paragraph 15 of the *Second Periodic Report* notes, the United States, in referring to actions taken to combat various forms of serious abuse, is not necessarily indicating that the examples given involve acts of torture as defined under Article 1 of the Convention, as ratified by the United States, or cruel, inhuman or degrading treatment or punishment as defined under Article 16 of the Convention, as ratified by the United States. Rather, the examples are included to illustrate the commitment of the United States

or, as the case may be, the sub-federal level authorities in the United States, to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.

As noted in the *Second Periodic Report*, complaints about abuse, including physical injury by individual law enforcement officers, continue to be made and are investigated and, if the facts so warrant, prosecuted. The Criminal Section of the Civil Rights Division is charged with reviewing such complaints made to the federal government and ensuring the vigorous enforcement of the applicable federal statutes. The Department remains committed to investigating all incidents of willful use of excessive force by law enforcement officers and to prosecuting federal law violations where action by state or local authorities fails to vindicate the federal interest.

The Civil Rights Division also investigates conditions in state prisons and local jail facilities pursuant to CRIPA, and investigates conditions in state and local juvenile detention facilities pursuant to either CRIPA or Section 14141. These statutes allow the Department to bring legal actions for declaratory or equitable relief for a pattern or practice of unconstitutional conditions of confinement. For additional information, see the responses to Questions 5 and 29.

Regarding the Committee's final question about what measures have been taken to improve conditions of detention, when the investigations of the Civil Rights Division uncover unconstitutional conditions at prisons, jails, or juvenile detention facilities, it works with local and state authorities to remedy these conditions. As noted above (see response to question 12), the Department of Justice utilizes subject matter consultants to develop remedial measures tailored to the problems identified and to the particularities of the facility. The remedies, often memorialized in negotiated settlement agreements, represent constitutional solutions and recognized best national practices. Once the reforms are agreed upon with the facility, DOJ will often work cooperatively with the jurisdiction to jointly select a monitor to ensure implementation. The monitor will then work with the jurisdiction to promptly identify issues of non-compliance and provide status assessments regarding compliance to both the jurisdiction and DOJ. A hallmark of DOJ's approach is transparency. For instance, CRD charges

its consultants with providing technical assistance on how to remedy identified issues throughout the investigation. CRD also ensures that the jurisdiction is fully apprized of problems through the use of exit interviews during each on-site visit and, when appropriate, immediate notification to the jurisdictions of life-threatening conditions.

In addition, CRD prosecutes law enforcement officers who have unconstitutionally used excessive force against persons in custody. Prosecution enhances conditions of confinement by providing general and specific deterrence to law enforcement officers, and ensuring persons in custody that laws prohibiting use of excessive force or other constitutional violations will be vigorously enforced. Since October 1, 1999, 359 law enforcement officers have been convicted of violating federal civil rights statutes. Most of these officers were charged with using excessive force.

30. Please provide statistical data regarding deaths in custody disaggregated by location of detention; gender, age and ethnicity of the deceased; and cause of death. Please provide detailed information on the results of the investigations in respect of those deaths, including any specific recommendations made following the inquiries.

Bureau of Prisons Institutions

From October 1, 2000 through September 30, 2005 (or Fiscal Years 2001 through 2005), a total of 1,692 inmate deaths occurred while the individual was housed in a Bureau of Prisons institution, and 44 deaths occurred while housed in a private facility under contract with the Bureau. A total of 151 were reported by Community Corrections Centers (CCCs). Statistical data disaggregated by gender, age, and ethnicity of the deceased and cause of death are provided in Annex 4.

Given the large number of cases, the Bureau is unable to provide detailed results of investigations. However, as a matter of practice and policy, serious incidents having criminal implications are referred to the Federal Bureau of Investigation for investigation. Additionally, follow-ups of each such incident with "after action reviews" are conducted by senior level staff from other Bureau sites to examine what occurred

leading up to the event or events and offer recommendations based on the findings to ensure any possible breakdowns are not repeated.

Department of Homeland Security

As described further in response to Question 6, the Department of Homeland Security (DHS) oversees two component agencies that are charged with securing the borders and enforcing the immigration and customs laws. U.S. Immigration and Customs Enforcement (ICE) handles interior enforcement, while U.S. Customs and Border Protection (CBP) generally handles enforcement at the borders.

U.S. Immigration and Customs Enforcement (ICE)

From October 1, 2003, to February 20, 2006, a total of 50 aliens have died while in ICE custody. Statistical data disaggregated by gender, age, and ethnicity of the deceased and cause of death are provided in Annex 5.

All ICE detainee deaths are reported to the ICE Office of Professional Responsibility (OPR) and the Joint Intake Center, which then refer cases, as appropriate, to the DHS Office of the Inspector General (OIG) or other agencies for a thorough investigation. In addition, any death where the preliminary cause of death is unclear or where questions arise regarding how the detainee died are also investigated independently of ICE by the custodial facility (*e.g.*, BOP), corporate owner (*e.g.*, Cornell), or local police department. Deaths due to suspicious circumstances or suspected violations of the ICE National Detention Standards will lead to a special on-site assessment conducted jointly by the ICE Detention Standards Compliance Unit (DMCP) and the Division of Immigration Health Services.

Since October 1, 2003, approximately 50% of detainee deaths have been followed by an autopsy, either at the request of ICE or based upon standard procedure in the state or locality where the death occurred. Generally speaking, the deaths that are not autopsied are deaths that occur in hospitals, nursing homes or chronic care facilities. These are situations where a detainee was known to have a terminal illness or a chronic condition with a poor prognosis for survival.

ICE does not maintain a central repository of recommendations made by investigating agencies or internal audits or corporate reviews. ICE's Office of Detention and Removal Operations maintains copies of all on-site special assessments by DMCP and DIHS.

U.S. Customs and Border Protection (CBP)

Statistical data on deaths in CBP custody, disaggregated by gender, age, and nationality of the deceased and cause of death, for 2005 and 2006 to date are provided in Annex 6. There were six reported deaths in all. Various federal agencies (e.g., Federal Bureau of Investigation, DHS Office of Inspector General, ICE Office of Professional Responsibility), as well as local law enforcement authorities conducted investigations into the custodial deaths. As reflected in the material provide in Annex 6, the causes of death were determined to be suicide, possible suicide, attempted escape, medical condition (seizure), and possible medical condition (viral infection).

With respect to the six deaths that occurred in CBP custody in the calendar year 2005, CBP reviewed detention standards to ensure their proper implementation and strict adherence of all officers to these standards. In response to one of the deaths caused by an attempted escape from a fifth floor hospital hold room, CBP relocated the hold room to the first floor and to ensure that it has no outside access.

31. Please provide information in respect to the numerous deaths of detainees which have occurred under the State party's jurisdiction in Afghanistan and Iraq, allegedly after being tortured. Have those deaths been fully and impartially investigated, those found to be responsible prosecuted and punished in accordance with the seriousness of the offences?

The U.S. response to Question 31 and 32 is provided below.

32. Please provide updated detailed information on any specific cases of torture or cruel, inhuman or degrading treatment or punishment or similar offences committed by personnel of the State party in Afghanistan, Iraq and Guantánamo Bay, including number of cases, their status, the authorities before which they are pending and their outcome. In the view of the State party, how did such acts

occur, and what actions have been taken to ensure that there will be no recurrence of any such acts in places of detention under the State party's control?

Investigation of Deaths in DoD control

There have been a total of 120 deaths of detainees under Department of Defense control in Afghanistan and Iraq. There have been no deaths at Guantanamo. As the breakdown of cause of death in Annex 6 shows, the vast majority of these deaths were caused by factors such as natural causes or detainee-on-detainee violence. In only 29 cases was abuse or other violations of law or policy suspected. In these cases, these violations were properly investigated, and appropriate action was taken. As noted previously, the Department of Defense takes very seriously violations of the law, including the Uniform Code of Military Justice (UCMJ). The Department has described many of the measures it has taken to hold individuals responsible for violations at pages 64-70 and 79 -80 of the Annex to the *Second Periodic Report*. Further information is provided below.

Investigations of Deaths by Combatant Commands

On June 9, 2004, the Secretary of Defense issued a directive regarding the procedures and policies governing the death of a detainee in the control of the Armed Forces of the United States. This directive prescribes the processes and procedures to ensure that the circumstances and causes of death of a detainee are accurately determined and that violations of law or policy, if the cause of such death, is properly investigated and appropriate action taken.

Investigations regarding detainee deaths are conducted through Service Components, typically the Army Criminal Investigation Division (CID) or the Naval Criminal Investigation Service (NCIS). Prosecutions for alleged violations of the UCMJ are conducted by the Service Components.

Military Departments

In the Army, there were 6 investigations of detainees who died as a result of an alleged assault or as a result of an alleged act of unlawful violence while in U.S. custody in Afghanistan from 2001 to date. A brief synopsis of each investigation and court-martial summary, where applicable, is provided at Annex 6.

The Army conducted 19 investigations of detainees who died as a result of an alleged assault or as a result of an alleged act of unlawful violence while in U.S. custody in Iraq from March 2003 to date. A brief synopsis of each investigation is provided at Annex 6. In every case, allegations involving the death (or any allegation of abuse of a detainee) were fully and impartially investigated and the cases were carefully reviewed for prosecution.

The Department of the Navy, Naval Criminal Investigative Service (NCIS), has investigated two deaths of individuals under Navy control from March 2003 to date. Details are provided at Annex 6.

The Marine Corps have 14 known detainees who have died while being detained or while making escape attempts from USMC detention from March 2003 to date. The investigations into 10 of the deaths are closed. The investigations into four of the deaths, all NCIS investigations, are still open. One of the closed investigations involved two detainee deaths. All the other investigations, both open and closed, involve only one detainee death each. Therefore, the total number of investigations is 13. A summary of these investigations is provided at Annex 6.

Courts-Martial

As for the Army, there were nine investigations involving soldiers physically assaulting detainees under DoD control in Afghanistan. There were also 5 investigations whose allegations were unfounded, and another 4 investigations whose allegations could not be either substantiated or unsubstantiated. There remain 15 investigations involving assaults in Afghanistan that are still active, and in which a final determination as to the validity of the claims has not been made. In every case, allegations were fully and impartially investigated and the cases were carefully reviewed for prosecution.

There were 115 substantiated investigations involving soldiers physically assaulting detainees under DoD control in Iraq. There were 139 investigations where the allegations were unsubstantiated, and another 90 investigations where the allegations could neither be substantiated nor unsubstantiated. There remain 109 investigations involving assaults in Iraq that are still active, and in which a final determination as to the validity of the claims has not been made. In every case, allegations were fully and impartially investigated and the cases were carefully reviewed for prosecution.

There were no founded investigations involving service members' physically assaulting detainees under DoD control at Guantanamo Bay. There was one investigation where the allegations could neither be substantiated nor unsubstantiated. There are no other pending investigations involving assaults in Guantanamo Bay.

Of the above Army investigations, including cases involving the death of a detainee or other allegations of detainee abuse, there have been 85 cases that have resulted in courts-martial.

The U.S. Marine Corps has conducted courts-martial for various incidents of detainee abuse under the Uniform Code of Military Justice. There have been 22 substantiated incidents of abuse in Iraq involving 40 suspects. There were 119 incidents that were investigated and found to be unsubstantiated. 20 investigations are still pending. Of the 40 suspects, there have been 17 courts-martials, 7 nonjudicial punishments, and the remainder involve either pending cases (3) or administrative action.

Neither the Navy or Air Force reported any courts-martial for detainee abuse.

33. Please comment on the information that the official investigations conducted into allegations of torture and ill-treatment in Afghanistan and Iraq, and especially in the Abu Ghraib prison, were not fully independent. Were any investigations (Page 74 of the report (annex 1).) **carried out by an independent, judicial or non-military authority? If not, are any independent investigations foreseen in the future? Are there any independent entities monitoring these facilities (national or international or non-**

governmental)? Please provide the results of the investigations that were still ongoing at the time of submission of the report, including by the Naval Criminal Investigation Service and by the Naval Inspector General (Page 68 of the report.)**.**

Investigations

The Department of Defense has conducted 12 major reviews of its detention operations. These reviews have focused on all aspects of detention operations – from the point of capture to theatre-level detention facility operations. The investigations were not overseen or directed by DoD officials. Panels were allowed access to all materials and individuals they requested. They were provided any resources for which they asked, including the assignment of more senior personnel when investigations required it. Finally, senior DoD officials did not direct the conclusions drawn by the panels. As Secretary of Defense Donald H. Rumsfeld has said on numerous occasions and in numerous venues, with respect to the investigations, DoD policy was "to let the chips fall where they may." This fact was affirmed by former Secretary of Defense James R. Schlesinger in the presentation of his panel's report into detention operations. (See http://www.defenselink.mil/transcripts/2004/tr20040824-secdef1221.html, visited April 28, 2006.)

All investigations conducted by the Department have been impartial, fact-finding, reviews of detention operations. The recommendations generated by these investigations have been taken seriously (as described at pages 81-82 of the Annex to the *Second Periodic Report*).

With the exception of investigations that pertained to intelligence operations or sensitive ongoing military activities, the Department has made available to the public copies of the final reports (as in the case of the Army IG Report and the Schlesinger Report, or executive summaries of the major findings, as was the case in the Church report). The majority of all information gathered by the Department during its investigations has been made available to the public for review. Department officials have also briefed Members of the U.S. Congress and have spoken at length regarding the lessons learned and corrective measures the

Department of Defense has implemented resulting from the investigations' findings.

As the Department of Defense has conducted an honest, open, impartial, and fact-finding set of investigations since the events of Abu Ghraib into all aspects of detention operations, investigations by others are not foreseen at this time, as they would not add value. Should information come to light that would suggest additional investigation is warranted, the Department of Defense will, as it has prior, investigate such allegations fully and determine if an additional inquiry is warranted.

International Committee of the Red Cross (ICRC) access to detention facilities is described in the answer to Question 8 above.

In response to the Committee's question about the investigation conducted by the Naval Inspector General, the Department of Defense would direct the Committee to the executive summary of that inquiry.[23] The status of various investigations conducted by the Naval Criminal Investigation Service is provided in Annex 7.

Articles 13 and 14

34. Do the Combatant Status Review Tribunals and the Administrative Review Boards (Page 53 of the report (annex 1)) **have any jurisdiction regarding complaints of torture and cruel, inhuman or degrading treatment or punishment? How is their impartiality ensured when dealing with such cases?**

Scope/Subject Matter Focus of the CSRT and ARB Processes

Pages 54-62 of the Annex to the *Second Periodic Report* describe the scope, jurisdiction, and impartiality of the Combatant Status Review Tribunal and the Administrative Review Board processes. These

[23] *Available at* http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf, visited February 20, 2006.

processes do not exercise jurisdiction over complaints of torture and/or cruel, inhuman or degrading treatment or punishment. To the extent such credible allegations would be raised during such proceedings, they would be investigated and acted upon based upon the information that is uncovered. The Department of Defense takes very seriously allegations of detainee abuse and will hold accountable those who have violated the law or DoD policy.

35. Please provide detailed information on how, in practical terms, the "Justice For All Act" of 2004 has provided an improvement of the rights of victims of torture to obtain redress (Para. 65 of the report.)**? Since the enactment of the Act, has there been an increase in the number of complaints? Please provide statistical information.**

The Justice for All Act, discussed also at paragraph 65 of the *Second Periodic Report*, provides for the following rights of victims of federal crimes:

- the right to be reasonably protected from the accused;
- the right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused;
- the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding;
- the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; the reasonable right to confer with the attorney for the government in the case;
- the right to full and timely restitution as provided in law; the right to proceedings free from unreasonable delay; and
- the right to be treated with fairness and with respect for the victim's dignity and privacy.

See 18 U.S.C. § 3771.

These rights attach upon indictment of a defendant. The crime victim, the crime victim's lawful representative, and the attorney for the government may then assert these rights through a motion to the court in the district in which the defendant is being prosecuted for the crime. If the motion is denied, the crime victim, the crime victim's lawful representative, or the attorney for the government may apply for a writ of mandamus from the appeals court for that district. If a victim believes that he has been denied these rights by an employee of the Department, he may file a complaint with the Department of Justice's Victims' Rights Ombudsman (VRO), as provided for by regulation. See 70 Fed. Reg. 69650 (Nov. 17, 2005).

As far as the DOJ is aware, no alleged victims of torture by U.S. government personnel have asserted any of these rights, filed for writs of mandamus, or filed complaints with the VRO.

36. What remedies are available to detainees under the State party's jurisdiction outside the State party's territory with regard to acts of torture, and before what authority may they seek compensation? How many detainees have exercised this right so far? Please provide a breakdown of the statistical data regarding complaints of torture or ill-treatment according to gender, age, location of the complainant, and result of the investigation. Has compensation been provided to date, to how many victims, and in what amounts? Please provide information on compensation given to the Abu Ghraib victims (Page 79 of the report.).

Specific Claims made to the Department of Defense

Claims for alleged detainee abuse or maltreatment made against the Department of Defense are resolved through the Military Departments. The Army has responsibility for Operation Iraqi Freedom (OIF) and the Air Force has responsibility for Operation Enduring Freedom (OEF). Although not a basis for judicial proceedings, administrative tort claims may be filed and voluntarily paid under the Military Claims Act, 10 U.S.C. § 2733 and the Foreign Claims Act, 10 U.S.C. § 2734. Payment will depend on the facts presented. By statute, the Military Claims Act requires acts to be done within the scope of employment or incident to noncombat activities in order to be cognizable. The claimant must be found to be friendly to the United States or its allies. By statute, the

Foreign Claims Act provides possible monetary payment if the incident is caused by (or otherwise incident to the noncombat activities of) the armed forces, or if caused by a member of the military; however, a claim may be allowed only if in the case of a national of a country at war with the United States, or any ally of that country, the claimant is determined to be friendly to the United States.

Detainees may seek remedy under the Foreign Claims Act (FCA), 10 U.S.C. 2734, and the Military Claims Act, 10 U.S.C. 2733, when the FCA is not applicable. Detainees may seek compensation before the Secretary of the Army or his designee. The Secretary of the Army's designee is the Deputy General Counsel (Ethics and Fiscal).

The Army as the responsible service for all claims reports that there have been 33 detainees who have filed claims for compensation. The table at Annex 8 provides a breakdown of the statistical data regarding complaints of torture or ill-treatment according to gender, age, location of the complaint and result of the investigation.

No compensation has been provided to date, however, compensation has been offered in two cases. The amounts offered are annotated below:

- In case 04C01T065, which involved an Abu Ghraib detainee, a payment of $5,000 USD was recommended for lost wages and exacerbation of pre-existing post-traumatic stress disorder. (The Claimant had sought $3,582,000 USD.)

- In case 04C01T064, a payment of $350 USD was recommended, $300 USD for lost cash and $50 USD for the value of lost documents. These losses occurred while the claimant was under DOD control. (The Claimant had sought $350,000 USD.)

37. Please explain how the Prison Litigation Reform Act, which contains a provision establishing "that no federal civil action may be brought by a prisoner for mental or emotional injury suffered while

in custody without a prior showing of physical injury" (Para. 153 of the report.)**, is compatible with, amongst others, article 13 of the Convention, in view of the fact that it limits the right of victims to complain and increases the possibility of impunity for perpetrators.**

The Prison Litigation Reform Act of 1995 ("PLRA"), discussed also at paragraph 153 of the *Second Periodic Report*, contains several provisions designed to curtail frivolous lawsuits by prison inmates. One provision is that no federal civil action for damages may be brought by a prisoner for mental or emotional injury suffered while in custody without a prior showing of physical injury. 42 U.S.C. 1997e(e). This provision is fully compatible with article 13 of the Convention, which provides that "[e]ach State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities."

Section 1997e(e) does not limit a prisoner's ability to "complain to and to have his case promptly and impartially examined by competent authorities regarding allegations of torture." CAT Article 13. Section 1997e(e) allows a prisoner to bring a federal civil action to redress allegations of torture. A prisoner alleging actual physical injury may seek compensatory, nominal, and punitive damages, and injunctive and declaratory relief. See, *e.g.*, *Thompson* v. *Carter*, 284 F.3d 411, 416 (2d Cir. 2002); see also 42 U.S.C. 1997e(e). Courts of appeals have held that Section 1997e(e) permits prisoners alleging a non-physical constitutional injury to seek nominal and punitive damages, and injunctive and declaratory relief. See, *e.g.*, *Thompson*, 284 F.3d at 416; see also *Mitchell* v. *Horn*, 318 F.3d 523, 533-534 (3d Cir. 2003); *Allah* v. Al-*Hafeez* 226 F.3d 247,251-252 (3d Cir. 2000). Thus, the PLRA does not "limit[] the rights of victims to complain."

In any event, Article 13 merely provides that a covered individual have "the right to complain to, and to have his case promptly and impartially examined by, [the State Party's] *competent authorities*." Article 13 does not restrict "competent authorities" to federal courts constituted under Article III of the U.S. Constitution. Nothing in the PLRA displaces the wide range of administrative and other avenues by which prisoners may present complaints and grievances, including

several judicial remedies before state courts. Some of these remedies are listed in response to Question 5 above.

Section 1997e(e) also does not "increase[] the possibility of impunity for perpetrators." Those who violate the rights of prisoners are subject to both civil and criminal liability for their actions. See, *e.g.*, 42 U.S.C. 1997e(e); 18 U.S.C. § 242. In addition, the government is authorized under CRIPA to investigate institutional conditions and file suit against state and local governments for a pattern or practice of egregious or flagrant unlawful conditions in government-run juvenile correctional facilities, and adult jails and prisons. See 42 U.S.C. § 1997a(a). The PLRA does not impact the United States' authority under CRIPA.

38. Have victims of torture perpetrated by personnel of the State party been treated in any Centre for Victims of Torture in the State party (Para. 84 of the report.)**?**

The work of the Center for Victims of Torture, both within the United States and abroad, is summarized in paragraphs 74 and 77 of the *Second Periodic Report*. The United States is not aware of any allegations of torture by U.S. Government personnel that have been brought to the attention of the Center.

39. Please update information on the habeas corpus cases pending before district courts (Page 59 of the report.)**, following the decisions of the Supreme Court in *Rasul v. Bush*. Does the State party ensure the right of habeas corpus to detainees under its control in other parts of the world?**

Between the date of the United States' *Second Periodic Report* and March 2006, approximately 140 additional petitions for writ of *habeas corpus* were filed in U.S. district courts on behalf of more than 200 additional Guantanamo detainees, for a total of approximately 195 *habeas corpus* cases on behalf of more than 350 detainees presently pending before 15 district court judges. By order of those judges, proceedings on the merits of almost all of these cases are awaiting a decision of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") on the related appeals pending before it. These proceedings and appeals are described in the *Second Periodic Report*. This decision is also expected

to address the position of the U.S. government that the Detainee Treatment Act eliminated district court jurisdiction over these cases. In the meantime, a few judges have considered some emergency motions for relief concerning conditions of confinement and access to counsel. No judge has ordered changes to the detainees' conditions of confinement, however.

On December 30, 2005, the President signed the Detainee Treatment Act of 2005. This new statute amends the *habeas corpus* statute to withdraw the prior jurisdiction of U.S. courts to consider *habeas corpus* petitions or other claims by or on behalf of Guantanamo detainees except under certain circumstances delineated within the statute. At the same time, however, the statute also provides Guantanamo detainees held as enemy combatants the opportunity to obtain review of the determination of their enemy combatant status or a conviction by a military commission with a resulting sentence of greater than 10 years imprisonment through a special proceeding in the D.C. Circuit and whether the military tribunal followed its own procedures. Specifically, the court may consider whether the status determination of the Combatant Status Review Tribunal (CSRT) was consistent with the standards and procedures specified by the Secretary of Defense and, to the extent the Constitution and laws of the United States are applicable, whether the use of the CSRT standards and procedures to make the determination is consistent with the Constitution and laws of the United States. In the case of military commission convictions, the court may consider whether the final decision was consistent with the standards and procedures specified in Military Commission Order No. 1, and, to the extent the Constitution and laws of the United States are applicable, whether those standards and procedures are consistent with the Constitution or laws of the United States.

With respect to the Committee's second question, under U.S. law, the writ of *habeas corpus* may be granted by federal judges "within their respective jurisdictions." Generally, this language means that a writ of *habeas corpus* is available where appropriate to individuals detained within the territorial jurisdictions of the federal courts, or, in certain circumstances, to U.S. citizens detained abroad by United States officials subject to the jurisdiction of the federal courts. In *Rasul v. Bush*, 124 S. Ct. 2686 (2004), the U.S. Supreme Court held that the federal courts have statutory jurisdiction to issue writs of *habeas corpus* with respect to

aliens detained as enemy combatants at Guantanamo. The Detainee Treatment Act of 2005 revised the *habeas corpus* statute to eliminate such jurisdiction while providing defined review of a detainee's enemy combatant status determination or military commission conviction.

With respect to detainees under Department of Defense control in Iraq and Afghanistan, as described in the *Second Periodic Report*, the Department of Defense conducts a procedure for reviewing a detainee's status.

40. Is the State party considering reviewing its decision not to apply the Geneva Conventions of 12 August 1949 to detainees who are considered "enemy combatants" by the State party, in Afghanistan, Iraq, Guantánamo Bay or in other locations under the jurisdiction of the State party? What is the exact legal status of those persons, and what international instruments are applicable to them for the protection of their human rights?

The applicability of and compliance with the Geneva Conventions is a matter unrelated to the scope of U.S. obligations under the CAT.

In addition, as is made clear by the detailed discussion in Part One, Section II(B) of the Annex to the *Second Periodic Report*, the Committee's question has false premises. The United States has not made any "decision not to apply" the Geneva Convention where it would by its terms apply. For example, the President made clear at the start of Operation Iraqi Freedom that the United States would apply the Geneva Conventions to the conflict.

The President determined that the Third Geneva Convention Relative to Prisoners of War *does* apply to the Taliban detainees, but that the Taliban fail to meet the requirements of Article 4 of that Convention and so are not entitled to the status of prisoners of war. With regard to the al-Qaeda detainees, the President did determine that the Geneva Convention did not apply because al-Qaeda is not a party to the Convention. Article 2 of the Convention makes it clear that the Convention only applies as between High Contracting Parties.

Nevertheless, President Bush determined in 2002 that "the United States Armed Forces shall continue to treat detainees humanely, and to

the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

Moreover, the United States Government complies with its Constitution, its laws, and its treaty obligations. Acts of physical or mental torture are expressly prohibited. The United States Government does not authorize or condone torture of detainees. Torture and conspiracy to commit torture are crimes under U.S. law, wherever they may occur in the world. Moreover, no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment. Violations of these and other detention standards have been investigated and punished.

On a final note, the United States is aware that questions are often raised about the concept of "unlawful combatants," which certain academics and others have asserted is not a concept found in the Geneva Conventions. The United States strongly disagrees: the concept of "unlawful combatants" is well-recognized in international law by courts, in military manuals, and by international legal scholars. For example, Professor Adam Roberts, who has written widely on the law of armed conflict, has stated that the concept of unlawful combatants is implicit in the Geneva Conventions. Another leading scholar, Ingrid Detter, has noted that unlawful combatants, while legitimate targets for belligerent action, are not entitled to prisoner of war status if they are captured.

Article 15

41. Please provide examples of any judicial cases where the courts have declared statements inadmissible on the ground of having being obtained coercively.

As the United States explained in its *Initial Report*, and in its *Second Periodic Report*, U.S. law provides strict rules regarding the inadmissibility of coerced statements. U.S. courts take these rules seriously. *See, e.g., United States v. Lopez*, 437 F.3d 1059 (10th Cir. 2006) (suppressing confession despite the fact that officers delivered Miranda warnings in advance of questioning); *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006) (holding that, under the circumstances of the case, a

renewed confession after intervening Miranda warnings was not voluntary and thus inadmissible). The *Initial Report* included a several page discussion, citing well over a dozen cases, describing how U.S. rules regarding the exclusion of coerced statements are even stricter than the CAT requires. We direct the Committee to those reports for further details.

42. How is the provision in article 15 of the Convention prohibiting the use of any statement obtained as a result of torture as evidence in any proceedings, except against the alleged torturer, specifically guaranteed at the Combatant Status Review Tribunals and at the Administrative Review Boards (Page 53 of the report (annex 1).)**? Please provide information on any statement that has been considered inadmissible in this context.**

Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards.

With regard to military commissions proceedings, the United States would like to draw the Committee's attention to Military Commission Instruction Number 10, dated March 24, 2006, which provides that "the commission shall not admit statements established to have been made as a result of torture as evidence against an accused, except as evidence against a person accused of torture as evidence the statement was made."[24]

Article 16

43. The reservation by the State party to article 16 limits the meaning of cruel, inhuman or degrading treatment or punishment to the treatment or punishment prohibited by the Fifth, Eighth and Fourteenth Amendments to the Constitution. In practical terms, what kinds of treatment or punishment are prohibited, and admissible, by the amendments but not by the Convention? Please provide concrete examples.

[24] Available at http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf

Pursuant to the U.S. reservation, the United States agreed under Article 16 to "undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture," "insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution." As explained in the *Initial Report*, and reiterated in the *Second Periodic Report* to, this reservation was adopted because of concern over the uncertain meaning of the phrase "cruel, inhuman or degrading treatment or punishment" ("CIDTP") and was intended to ensure that existing U.S. constitutional standards would satisfy U.S. obligations under Article 16. Moreover, while the United States recognizes that other courts in other countries, often dealing with different instruments than the CAT, have held that certain types of conduct satisfy standards similar to CIDTP, the relevant test for the United States is set forth in the U.S. reservation.

Because the meaning of Article 16's "cruel, inhuman or degrading treatment or punishment" standard is uncertain, it is difficult to state with certainty and precision what treatment or punishment, in the absence of a clarifying reservation, would be prohibited by Article 16, but permitted by the reservation. It is this very uncertainty that prompted the reservation in the first place.

In light of this uncertainty it is difficult to provide concrete examples of what kind of treatment or punishment would be permissible under the U.S. Constitution, but not by the Convention. Without expressing a view on whether Electro-muscular disruption devices ("EMD's"), or specifically "Tasers", stun devices or restraint chairs would be covered by Article 16 of the Convention absent the United States reservation, the United States is aware, as indicated by Question 46 below, that the Committee has questioned the compatibility of the use of such devices with Article 16 of the CAT. However, under U.S. law, courts have routinely upheld the lawfulness and constitutionality of such practices when employed correctly, as described in greater detail below in response to Question 46.

44. In view of the reservation by the State party to article 16, is this article fully applicable outside the State party's territory, or in territories under the jurisdiction of the State party or under the de

facto control of the State party (See note 12.)**? Please clarify what is considered to be within the Special Maritime and Territorial Jurisdiction. Does article 16 of the Convention apply to the Special Maritime and Territorial Jurisdiction** (Para. 45 of the report.)**? Is cruel, inhuman or degrading treatment or punishment committed by its agents against foreigners outside the territory of the State party punishable by law in the State party?**

By its terms, Article 16 of the CAT obliges States Parties "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" (emphasis added). Clearly this legal obligation does not apply to activities undertaken outside of "territory under [the] jurisdiction" of the United States. The United States does not accept the concept that "de facto control" equates to territory under its jurisdiction. There is nothing in the text or the travaux of the Convention that indicates that the two are equivalent.

It is also important to note that the United States accepted Article 16 subject to the following reservation:

> That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Therefore, the United States did not accept the obligation to prohibit "cruel, unusual or degrading treatment or punishment" but to prevent "cruel and unusual treatment or punishment" as proscribed by the U.S. Constitution.

Nevertheless, as a matter of U.S. law, as noted in the answer to Question 53 below, the Detainee Treatment Act of 2005 provides that "[n]o individual in the custody or under the physical control of the U.S. government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment."

The special maritime and territorial jurisdiction of the United States is a creation of statute. *See* 18 U.S.C. § 7. It includes aircraft belonging to a U.S. citizen or corporation when in flight over the high seas, certain spacecraft while in flight, and, when the offense is committed by or against a U.S. national, or at certain U.S. diplomatic and military installations in foreign states. *Id.* For certain criminal statutes, Congress uses this definition to extend their coverage beyond the territory of the United States.

The territorial restriction in Article 16 of the CAT, which also appears in other provisions of the CAT, uses different terms to describe its coverage and serves a purpose entirely different from the technical term "special maritime and territorial jurisdiction," which Congress used to define the jurisdiction of certain U.S. criminal statutes. Article 16 is limited, by its own terms, to "territory under [the State Party's] jurisdiction." Article 5 of the CAT expressly distinguishes between "territory under [a State Party's] jurisdiction" and "on board a ship or aircraft of that State." *See* Article 5(a) (requiring a State Party to "establish its jurisdiction" over offenses that constitute torture "[w]hen the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State"). Yet a crucial part of Congress's definition of "special maritime and territorial jurisdiction," is vessels and aircraft belonging to United States citizens traveling on or flying over the high seas. 18 U.S.C. § 7(1), (5). Moreover, "special maritime and territorial jurisdiction" includes concepts obviously inapposite to Article 16's reach, such as offenses committed on certain spacecraft and in "places outside the jurisdiction of any nation." 8 U.S.C. § 7(6)-(7). Thus, the "territory under [a State Party's] jurisdiction," as employed by the CAT, and the "special maritime and territorial jurisdiction," as employed by U.S. criminal law, are distinct concepts.

Also, Congress's use of the term "special maritime and territorial jurisdiction" reaches some geographic areas only with regard to offenses committed by or against U.S. nationals. In contrast, the term "territory under [a State Party's] jurisdiction," is not cast in terms of the nationality of perpetrators or victims, but solely the place in which the activity occurs. Indeed, Article 5 of the CAT expressly recognizes that "territory under [a State Party's] jurisdiction" is distinct from jurisdiction that is based upon the nationality of the victim of conduct. *See* Article 5(a), (c) (requiring the extension of the jurisdiction to "any territory under [a State

Party's] jurisdiction," on the one hand, and "[w]hen the alleged offender is a national of that State," as well as "[w]hen the victim is a national of that State if that State considers it appropriate," on the other). Under these circumstances, the technical device of "special maritime and territorial jurisdiction" occasionally deployed by Congress to extend certain criminal prohibitions extra-territorially does not govern the scope of Article 16's restrictions in "territory under [a Contracting Party's] jurisdiction."

Although unrelated to the treaty obligations of the United States under Article 16, that Congress occasionally extends the reach of certain criminal statutes to the 'special maritime and territorial jurisdiction of the United States' will occasionally prohibit conduct resembling 'cruel, inhuman or degrading treatment' outside of U.S. territory.

In reference to the Committee's final question, as already noted, cruel, inhuman or degrading treatment or punishment, as defined by the Detainee Treatment Act of 2005, is prohibited under that Act and is also prohibited under the Uniform Code of Military Justice, which governs U.S. military personnel wherever they may be located and prohibits abusive conduct.

45. Please provide examples of practical implementation of the National Detention Standards by which non-citizen detainees were provided with better conditions of detention (Para. 126 of the report.)**. Please provide information on the measures taken to address the complaints of harassment and sexual violence against immigrant women by border patrol agents.**

The National Detention Standards, discussed also at paragraphs 126-128 of the *Second Periodic Report*, originated in the former Immigration and Naturalization Service (INS) in March 1998 in response to an American Bar Association request to the DOJ and now serve as a framework for selection of contract detention facilities. They were augmented by 19 additional standards in 2000 and generally follow the American Correctional Association guidelines. They were phased in over a two-year period at all DHS detention facilities, including facilities operated by contract service providers, and state and local government partners. The American Bar Association applauded the standards as a

"significant achievement" and "good first step towards providing uniform treatment and access to counsel for immigrants and asylum seekers."[25]

One practical example of the current applicability of the National Detention Standards can be seen in the recently opened South Texas Detention Complex, a contract detention facility comprised of several secure "pods," which allow for separation of detainees based on gender and degree of risk posed, consistent with the National Detention Standard relating to detainee classification,[26] and a modern kitchen and half-million gallon fresh-water backup tank to ensure that detainees are provided secure food service and ample water, consistent with the National Detention Standard relating to food service and hunger strikes,[27] For more information on this new facility, please see the related ICE press release issued on May 17, 2005, available at http://www.ice.gov/pi/news/newsreleases/articles/sna051705.htm. For other examples of the National Detention Standards, please see the response to Question 49 below, which also addresses measures to address complaints of and prevent sexual violence for persons held in the custody of the Department of Homeland Security.

The Department of Homeland Security, through its component immigration enforcement agencies, U.S. Immigration and Customs Enforcement (ICE) and U.S, Customs and Border Protection (CBP), continues to adhere to the National Detention Standards. ICE compliance with the National Detention Standards is discussed in paragraphs 126-128 of the *Second Periodic Report*. All ICE facilities used to house immigration detainees are reviewed for compliance with the National Detention Standards on an annual basis. In 2005, over 300 such reviews were conducted. ICE currently has over 309 trained officers authorized to conduct compliance reviews.

---

[25] The related INS press release is available at http://www.uscis.gov/text/publicaffairs/newsrels/detainee.htm

[26] Available at http://www.ice.gov/doclib/partners/dro/opsmanual/classif.pdf

[27] Available at http://www.ice.gov/doclib/partners/dro/opsmanual/foodsvc.pdf and http://www.ice.gov/doclib/partners/dro/opsmanual/hunger.pdf.

CBP operates two types of facilities for temporarily holding apprehended aliens pending transfer to longer-term ICE detention facilities or Department of Health and Human Service facilities for unaccompanied juvenile aliens or pending imminent return abroad.

First, CBP's Office of Border Patrol (OBP) operates hold rooms for individuals apprehended by the Border Patrol attempting illegal entry to the United States between lawful ports of entry. The Border Patrol adheres to the National Detention Standards to the extent that they may apply to its temporary and limited holding facilities. The Border Patrol is in the process of promulgating its own hold room standards that address the specific needs of the hold rooms at Border Patrol stations.

Second, CBP's Office of Field Operations manages hold rooms at official ports of entry. On March 9, 2004, CBP issued Directive No. 3340-030A titled "Secure Detention Procedures at Ports of Entry." As with the Border Patrol procedures, the port of entry detention procedures are specific to the temporary holding of individuals denied entry and awaiting either transfer to an ICE detention facility pending formal removal proceedings or imminent return following withdrawal of their applications for admission or following a determination that they are subject to expedited removal under 8 U.S.C. §§ 1187 (visa waiver refusals) or 1225(b) (expedited removal for misrepresentation or fraud or attempted entry without proper documents) of the Immigration and Nationality Act. This directive consolidates the former INS and U.S. Customs Service ports of entry detention policies and procedures, including those provisions of the National Detention Standards that related to holding facilities at ports of entry. The current CBP Directive contains strict guidelines providing for (1) prioritization of detention resources for terrorists, special interest cases or criminals, smuggling attempts, entry through fraud, and violators of law; (2) duration of detention whereby detention at ports of entry is limited to no more than 24 hours; (3) exceptions to detention for persons for those with medical conditions, for family units, for persons of advanced age, or unaccompanied juveniles; (4) maintenance of detention controls to include detention logs, detention cell monitoring, segregation by gender and age, and medical issues; (5) safe, humane use of restraints, provided the officer has reasonably articulable facts to support the decision to use

restraints; and (6)search, restraint, transfer and escort procedures designed to ensure officer and detainee safety.

Separate guidelines and procedures are established to ensure the protection of juveniles in detention. CBP procedures for the detention and processing of juvenile aliens are generally governed by regulations at 8 C.F.R. § 236.3 (promulgated in 2002 by the former INS). Certain aspects, however, have been amended to reflect the changes made by the Homeland Security Act of 2002, which transferred responsibility for the detention of unaccompanied juvenile aliens to the Department of Health and Human Services' Office of Refugee Resettlement. Furthermore, CBP follows the protocols described in the INS Juvenile Protocol Manual (Mar. 1999). These protocols include separation of unaccompanied juveniles from unrelated adults whenever possible, access to clean toilets and sinks, drinking water and food (to include hot meals), medical assistance whenever required, adequate ventilation and environmental controls, adequate supervision to protect juveniles from others, and reasonable allowance for contact with family members.

The Department of Homeland Security has established management controls and reporting requirements to ensure complete compliance with all detention policies. ICE and CBP employees are required to report allegations of misconduct to the DHS Office of the Inspector General, the ICE Office of Professional Responsibility or the Joint Intake Center. The Office of the Inspector General is notified of any misconduct reported directly to ICE Office of Professional Responsibility or the Joint Intake Center and retains authority to investigate any allegation involving DHS employees or contractors.

46. According to information before the Committee, several deaths following the use of tasers have occurred, raising serious concerns about the safety of this instrument. Please provide detailed information on their use, including any measures taken to make their use safe.

Electro-muscular disruption devices ("EMD's") have been in use by law enforcement agencies in the United States for many years. Several companies have sold EMD-based devices, but Taser International, Inc. now dominates the market. Police agencies have deployed two models from Taser International, Inc., the M26 and X26, in

large numbers in recent years. These weapons deliver high-voltage electrical pulses to a targeted individual through two wire contacts and induce muscle tetany, thus incapacitating the individual. EMD devices are considered "less-lethal weapons," because they incapacitate without intending to kill the targeted individual. After the deployment of EMD devices, many jurisdictions have seen dramatic drops in injuries and deaths in suspects, officers, and bystanders involved in use-of-force incidents.

Through the Departments of Justice and Defense, the U.S. Government is conducting extensive research into the safety and effectiveness of EMD devices. Research is underway to improve the understanding of electrical current flow through the human body, examine the effect of EMD on human volunteers, monitor the use of less-lethal devices in actual incidents, and determine if use-of-force outcomes improve when less-lethal devices are available. In addition, the Department of Justice works with local police agencies to assist them in their development of policies regarding the use of EMD devices. This policy guidance includes consideration of community acceptance, use-of-force protocols, continuous monitoring of all uses of EMD devices, medical response, and training. A hypothetical example of such guidance would be working with a law enforcement agency to develop a specific protocol regarding the removal of EMD taser probes and training officers to identify when emergency medical personnel should be contacted for such removal. Finally, the Departments of Justice and Defense continue to develop less-lethal options, including novel EMD devices, that may provide improved safety and effectiveness to law enforcement and military personnel.

The use of tasers to control arrestees and inmates is consistent with the law. Courts have reviewed the application of such devices for consistency with the Eighth Amendment's "prohibition of cruel and unusual punishment" under the Eighth Amendment of the U.S. Constitution, examining whether the use of such force was excessive of whether the infliction of pain is "unnecessary and wanton." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). A prison official's use of force against a post-sentencing inmate is unconstitutional if the force was inflicted "maliciously and sadistically to cause harm," rather than in a "good faith effort to maintain or restore discipline." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S.

312, 320-321 (1986)). Analysis of the use of excessive force with regard to pre-trial detainees begins under the Fifth Amendment. *See e.g., Bell v. Wolfish*, 441 U.S. 520, 535 (1979), *Andrews v. Neer*, 253 F.3d 1052, 1061; *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989).

Courts, in applying the *Hudson* standard to both pre-sentencing and post-sentencing inmates, have found the use of stun technology, restraint chairs, or other devices unconstitutional where they were not used in good faith. *See, e.g., U.S. v. Tines*, 70 F.3d 891 (6th Cir. 1995) (plaintiff prisoners prevailed in their suit against prison guards' use of stun guns, leg irons, handcuffs, and riot sticks against them as punishment for stealing another prisoner's shoes); *Estate of Moreland v. Dieter*, 395 F.3d 747 (7th Cir. 2005) (police officers' fatal beating and use of pepper spray and a restraint chair against a pre-trial inmate was unconstitutional); *Hickey v. Reader*, 12 F.3d 754 (8th Cir. 1993) (the use of a stun gun on a non-violent inmate who refused to sweep his cell was unconstitutional). On the other hand, the use of such devices does not constitute a constitutional violation where the force is applied in good faith to respond to the security risk posed. *See, e.g., Fuentes v. Wagner*, 206 F.3d 335 (3d. Cir. 2000) (no excessive force where a combative pre-sentencing detainee was placed in a restraint chair for 8 hours and was given regular breaks out of the chair according to policy); *Caldwell v. Moore*, 968 F.2d 595 (6th Cir. 1992) (the use of a straightjacket and stun gun to subdue an inmate after he kicked his cell door and shouted for hours was in good faith and constitutional); *Jasper v. Thalacker*, 999 F.2d 353 (8th Cir. 1993) (no constitutional violation where stun gun was used on an inmate who threatened and lunged at a guard).

Furthermore, use of tasers often obviates the need to use deadly or other forms of more severe force. Nevertheless, the Department of Justice remains committed to investigating and, where appropriate, prosecuting use of tasers where the circumstances indicate a willful use of excessive force in violation of Constitutional standards.

DoD Combatant Commands

The Department of Defense employs tasers as a non-lethal means of dispersing unruly crowds, rioting detainees, or for the protection of designated personnel. Tasers have passed legal review with the Department of the Army, Office of the Staff Judge Advocate, which is

responsible for ensuring U.S. military compliance with the Law of War. As with other Riot Control Means (RCM), taser users, including on-scene commanders, must be properly trained and qualified under the appropriate service regulations and non-lethal weapons course instruction prior to use. Tasers are authorized for use IAW CFC-A and MNF-I policy. USCENTCOM policy has approved the use for tasers with respect to detainees. There are SOPs and TTPs that must be followed with respect to any use of a taser.

Military Departments

The Army has reported that there are no investigations of detainee deaths at any location involving the use of Tasers. The Taser has been evaluated and found to be an acceptable alternative to the use of deadly force when properly employed by trained personnel.

There have been 14 investigations involving the alleged use of Tasers on detainees, but none of those detainees died. Two of the 14 investigations are still open and active. In 7 of the 14 investigations, the allegations of unlawful use of the Taser were unfounded, and in 3 more investigations, the allegations could neither be substantiated nor unsubstantiated. In only 2 of the 14 investigations have the allegations of unlawful use of the Tasers been substantiated. In those two cases, the investigations were referred to the appropriate Army commanders for disciplinary action. Seven soldiers received nonjudicial punishment. Six soldiers were punished at a summary court-martial. Three were tried at a court-martial:

1. On 13 July 2005, Staff Sergeant M was charged with Dereliction of Duty, Maltreatment, and False Official Statement. On 7 August 2005 the charges were referred to General Court-Martial. The charges were withdrawn on 5 September 2005 when an offer to plead guilty before a Summary Court-Martial was accepted. On 22 September 2005, Staff Sergeant M was convicted and sentenced to reduction to E-5 and forfeiture of 2/3 pay for 1 month.

2. On 13 July 2005, Sergeant D was charged with Dereliction of Duty, Maltreatment, and False Official Statement. He pled guilty at a Special Court-Martial on 11 September 2005 and was

sentenced to reduction to E-1 (the lowest enlisted rank), forfeiture of $600 pay per month for 5 months, and confinement for 5 months

3. On 13 July 2005, Sergeant F was charged with Conspiracy, Dereliction of Duty, Maltreatment, False Official Statement, Assault, and Obstruction of Justice. He pled guilty at a Special Court-Martial on 5 September 2005 and was sentenced to reduction to E-1 (the lowest enlisted rank), forfeiture of $823 pay per month for 12 months, confinement for 12 months, and a Bad-Conduct Discharge.

- In Fiscal Year (FY) 2004, the Department of Defense Joint Non-Lethal Weapons Program (JNLWP) investigated Electro-Muscular Incapacitation devices as a potential Non-Lethal Weapon under the definition of a weapon that "incapacitates" while minimizing injuries or fatalities. The JNLWP requested the DoD Human Effects Center of Excellence (HECOE) conduct a thorough Human Effects Risk Characterization (HERC) in order to determine the safety of use. The HERC completed in FY 05 found that Taser's are generally effective for their intended use. Subsequent to the HERC, the Services, in their Title 10 role, procured the Taser device and, coupled with formal policy and treaty reviews, deployed them in small quantities. Prior to being deployed for operational use, two separate legal reviews were done, as well as a safety release. To further ensure their safe use, Tasers are only authorized for use by individuals who have been trained by certified instructors on the proper operation and employment of this device. To date, no deaths have occurred because of DoD Taser use.

The Air Force does not normally employ Tasers in detention operations and is not employing them today. However, they were carried during detainee transport operations, but none were actually used. All personnel were trained and certified in their use.

The Marine Corps does not normally use Tasers in enemy detainee operations. Corrections Marines are taught unarmed self-defense (USD), and the use of batons for riot control situations, oleoresin capisum (OC) spray for use in limited situations, and non-lethal shotgun use in emergency responses only. The method of USD taught is modified gain physical control using minimum force necessary.

Training for proper use of Tasers is included in the pre-deployment training of detention personnel; however, the Department of Defense has no recorded data on the actual use of Tasers within Marine Corps operated detention facilities in theater.

Department of Homeland Security –

As a matter of policy Bureau of Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) officers are not authorized to use Tasers and other electronic muscular disruption devices.

47. Why are juveniles detained with adults in federal or state facilities, and under what conditions, considering that federal law prohibits juveniles being held in custody with adults? How many juveniles are still detained with adults in federal or state facilities (Para. 116 of the report.)**?**

Detention of juveniles for law enforcement purposes

As an initial matter, it should be noted that that the detention of juveniles with adults would not *per se* constitute cruel, inhuman or degrading treatment or punishment.

As a matter of United States criminal law, the term "juvenile" signifies a legal status that, for the purposes of prosecution and incarceration, depends on age and offense, and often the subject's court history. In the United States, each of the fifty states are free to define the term "juvenile," and age is often one of multiple factors. In most states, a juvenile court has original jurisdiction over all youth charged with a violation of law who were younger than age 18 years at the time the criminal offense was committed, the arrest, or when referral to a court is made. In 10 states, the oldest age of original juvenile court jurisdiction is 16 years. In 3 states it is 15 years. For the purposes of disposition, state statutes may also extend juvenile court jurisdiction beyond the age of original jurisdiction. As of 2004, 34 states extend juvenile court jurisdiction in juvenile delinquency cases until the 21st birthday of the offender. Under state statutes, jurisdiction over juveniles charged with a violation of law may be transferred from the juvenile court to the criminal court. Each state may establish its own criteria for such transfers, often

including age, the type of offense, prior court history of the subject charged. State statutes may also contain "blended sentencing" provisions under which youth of juvenile age may face adult sanctions. These "blended sentencing" provisions also have state-specific age, offense, and court history criteria.

As a general rule, the state prison populations do not include "juveniles." State prisons house primarily inmates convicted in criminal court (adult court) of felony offenses. Individuals younger than 18 may be admitted to prisons, but would have been adjudicated and convicted as adults in state criminal courts. On the other hand, not all persons under the age of 18 who are convicted as adults would necessarily be sent to prisons with persons over the age of 18.

As stated in the Second Periodic Report, at Paragraph 164, in federal prisons, juveniles are not regularly held in prison with the regular prison population. Federal law prohibits juvenile offenders held in custody of federal authorities from being housed in correctional institutions or detention facilities in which they could have regular contact with adult offenders. *See* 18 U.S.C. § 5039. When a juvenile must be temporarily detained in an adult facility, as, for example, immediately following arrest, it is for a minimal period of time and "sight and sound" separation from the adult offenders is ensured within the institution. Similarly, under the Juvenile Justice and Delinquency Act, accused juvenile delinquents in custody of state authorities may be detained in adult jails for only 6 hours after arrest and only for the purposes of identification, processing, awaiting parental/guardian pickup. Juvenile delinquents also may be detained in adult jails 6 hours before and 6 hours after a court appearance. In both instances, juveniles must be "sight and sound" separated from adult inmates.

Regarding the Committee's second question, the 2004 Juvenile Residential Facility Census, the latest information available, provides counts of the number of residents who were younger than 21 who were held in juvenile facilities with residents who were older than 21. (Twenty-one years of age presents a meaningful benchmark because most states allow extended jurisdiction of juveniles up to age 21.) According to the census, there were 5,236 under-21 residents held in 29 state juvenile facilities with 767 residents who were 21 or older. At the federal level, as described at paragraph 164 of the *Second Periodic Report*, the Bureau of

Prisons holds less than 300 juvenile offenders in its custody, and all such offenders are housed in contract facilities where they are required to receive 50 hours per week of quality programming (e.g., GED, drug treatment, sex offender treatment, violent offender treatment.)

Detention of juveniles for immigration purposes

Juveniles are generally not detained with adults in DHS adult or juvenile detention facilities. DHS policy and the *Reno* v. *Flores* Settlement Agreement generally prohibit juveniles and unrelated adults being detained together. One exception allows for the detention of a juvenile with an unrelated adult for a temporary period of time (not to exceed 24 hours) only to the extent necessary for processing or for transport from a remote area.

A juvenile also may be detained in a family shelter care facility with an adult relative, such as the juvenile's parent(s). In the event a family is apprehended together and the decision is made to detain the family, DHS makes every effort to keep the family together in one of two family shelter care facilities: Berks in Leesport, Pennsylvania, or Casa San Juan in San Diego, California. This family unification policy is dependent upon available bed space. Where necessary, because of bed space limitations, families are separated. Adult family members are placed in DHS adult facilities and juveniles are placed with Department of Health and Human Services facilities for unaccompanied juveniles.

The family shelters are arranged like a college dormitory, contain schools for children, and provide English language instruction for adults, interpretation and translation services, and recreational activities. The shelters provide a safe, secure, and humane setting for detained families. There have been no serious incidents of domestic violence, child abuse, suicide, escape attempts, or staff misconduct at the family facilities.

For information concerning the care and placement of unaccompanied alien children, please see paragraphs 117-119 of the *Second Periodic Report.*

48. According to information before the Committee, detained women are kept shackled during childbirth. Why does the State party consider such a measure to be necessary? Please describe the

measures taken to prohibit detainees being chained together in gangs and to hitching posts (Paras. 121 and 124 of the report.). **What measures have been taken to review the regime of super maximum security prisons** (Para. 95 of the report.)**?**

It is not the general policy or practice of the United States Government to shackle female prisoners during childbirth. Although the use of restraints is not prohibited, the Bureau of Prisons does not generally restrain inmates in any manner during labor and delivery because they are not considered a flight risk. An inmate would be restrained only in the unlikely case that she posed a threat to herself, her baby, or others around her. The determination of whether the shackling of inmates in labor is permissible therefore depends on the facts of each case.

Allegations of the misuse of shackles or other restraints in both federal and state prisons (whose policy and practices may vary from those of the federal government) are investigated by the Department of Justice. It should be noted that the use of shackles on prisoners is not per se unconstitutional. In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Supreme Court stated that violations of the Eighth Amendment's ban on cruel and unusual punishments are measures that are "unnecessary and wanton inflictions of pain," that is, those that are "totally without penological justification," which may involve "deliberate indifference to the inmates' health or safety." Case law establishes that there are circumstances in which the use of shackles does not violate these principles. For example, in LeMaire v. Maass, 12 F.3d 1444 (9th Cir. 1993), the Ninth Circuit Court of Appeals denied the claim of an inmate who argued that being handcuffed and shackled while showering violated the Eighth Amendment's prohibition on cruel and unusual punishment. With regard to women in labor specifically, the district court in Women Prisoners of the Dist. of Columbia Dept. of Corrections v. Dist. of Columbia, 877 F. Supp. 634, 668 (D.D.C. 1994), vacated on other grounds, 899 F. Supp. 659 (D.D.C. 1995), and reversed on other grounds, 93 F.3d 910 (D.C. Cir. 1996), held that shackling is inhumane while a woman is in labor and shortly thereafter. DOJ's investigations of allegations of misuse of shackles are based on Eighth Amendment jurisprudence.

As discussed at paragraphs 121 –124 of the *Second Periodic Report,* the Department of Justice has been vigilant in its monitoring of

unconstitutional practices by prisons, including use of chain gangs and the hitching post.

The term "chain gang" commonly refers to a group of convicts chained together for work outside of the facility in which they are incarcerated. The use of chain gangs is not *per se* unconstitutional. However, the Department's investigations examine whether the practice is conducted in conformity with the Constitution (*i.e.*, providing inmates on chain gangs with adequate water, access to toilets, medical care, etc.). If the practice were conducted in violation of constitutional principles, the Department would seek immediate prohibition of such practices.

The Supreme Court declared the use of a hitching post unconstitutional under the circumstances in which it was used in *Hope v. Pelzer*, 536 U.S. 730 (2002). There a hitching post referred to a metal bar located outdoors to which inmates were attached by means of mechanical restraints. The Court held that it is unconstitutional for prison officials, with deliberate indifference to the health or safety of inmates, to expose inmates to the "unnecessary and wanton infliction of pain." *Hope*, 536 U.S. at 737 (internal quotation marks omitted). The United States filed an amicus curiae brief in that case arguing that the use of the "hitching post" was, under the alleged circumstances, an unconstitutional practice.

Regarding the Committee's final question, CRIPA authorizes the Department of Justice to investigate conditions in state super maximum security prisons. The Department's investigations of such facilities apply the same constitutional standards as in other penal facility investigations.

DOJ has reviewed allegations involving several super maximum facilities in the last several years. To date, it has completed the investigation of one super maximum facility, in Baltimore, Maryland. In this instance, the Department worked with the State to address the identified deficiencies. The Department intends to continue to fully investigate all credible allegations pertaining to super maximum facilities.

49. What measures have been taken to prevent sexual violence against detainees, including inter-prisoner violence? What specific measures have been taken to protect female, juvenile and immigrant detainees against this type of violence? How many complaints have

been lodged by detainees and what was the outcome of the investigations; if compensation was paid, what was the amount?

Detainees in Bureau of Prison institutions

Bureau of Prisons staff and inmates alike are encouraged to report incidents of misconduct or otherwise inappropriate behavior. All allegations of staff misconduct, including allegations that a staff member has abused an inmate, are referred to the Office of the Inspector General (OIG), which then refers back to the Bureau of Prisons' organizationally independent Office of Internal Affairs those they want the Bureau to investigate. The OIG also has a hotline available to the public for reporting any Department of Justice employee they believe has violated their civil rights or civil liberties. When allegations of serious abuse are accompanied by credible evidence, the staff member is removed from contact with inmates or placed on administrative leave. Serious cases of staff misconduct are referred for criminal prosecution when warranted. Federal law, 18 U.S.C. § 5039, prohibits placing juvenile offenders in correctional institutions or detention facilities in which they could have regular contact with adult offenders.[28]

Bureau of Prison staff working with female inmates receive training on issues related to managing this specific population. In addition, all other existing Bureau policies regarding sexual abuse/assault/intimidation apply.

Additionally, paragraphs 96-101 of the *Second Periodic Report* discuss this issue in considerable detail.

Regarding the Committee's third question, allegations of the sexual abuse of inmates by Bureau of Prison's staff are tracked in accordance with the definitions outlined Title 18, United States Code, Chapter 109A. Non-criminal behaviors, such as indecent exposure, staff voyeurism, and

[28] The definition of juvenile for the purposes of this law is provided in the footnote to Question 47 above.

inappropriate comments of a sexual nature, are also tracked and are included with the criminal conduct allegations.

During Calendar Year (CY) 2004, the latest figures available, there were 17 allegations of *inmate-on-inmate non-consensual sexual acts* (also broadly referred to as "rape"). During CY 2004, there were no (0) guilty findings for *non-consensual sexual acts.* Please note that there is not necessarily a correspondence between allegations and findings because cases may span more than one calendar year.

During CY 2004, there were 66 allegations of *inmate-on-inmate abusive sexual contacts* (also broadly referred to as "touching offenses"). During CY 2004, there were 36 guilty findings for *abusive sexual contacts.* Please note that there is not necessarily a correspondence between allegations and findings because cases may span more than one calendar year.

During CY 2004, there were 201 allegations of BOP staff sexual misconduct. During CY 2004, 11 allegations were substantiated. Please note that it is possible for a single case to have multiple subjects; and similarly, the same subject could be charged with multiple allegations in the same case. If a single case involved multiple subjects, an allegation is counted for each subject and for each behavior. Any allegations made during previous years which were closed during CY 2004 are not reflected.

Regarding the Committee's final question, no compensation has been paid to any of the victims. The Bureau of Prisons' Administrative Remedy Program found at 28 C.F.R. 542.10 - 542.19 does not provide for monetary compensation for abusive treatment of inmates. Inmates may, however, seek compensation from the United States under the Federal Tort Claims Act, 18 U.S.C. 2671 et seq. That process requires submission, and denial, of an administrative claim before the claimant may bring a civil action against the United States in federal court.

Detainees in Department of Homeland Security Custody

The Department of Homeland Security has taken a number of serious steps to prevent violence, including sexual violence, towards detainees. To help prevent detainee-on-detainee violence, U.S.

Immigration and Customs Enforcement (ICE) officers classify all detainees upon arrival, before admitting them into any general housing populations in its facilities. ICE's "objective classification" system, promulgated pursuant to an ICE National Detention Standard entitled "Detainee Classification System" ensures that each detained alien is placed in the appropriate category and physically separated from detainees in other categories. In making classification determinations, ICE relies on objective information from the detainee's file such as current offense and past offenses and any history of escapes or attempted escapes, institutional disciplinary actions, violent episodes or incidents, or sexual or other physical assaults. Detainees with minor criminal records or convicted of nonviolent felonies, for instance, may not be housed with detainees who have been convicted of violent felonies.

DHS has also undertaken strong measures to prevent sexual violence in its detention facilities. For example, under the National Detention Standard entitled "Staff—Detainee Communication," ICE detainees must be afforded informal access to principal facility staff members on a regular basis. That policy promotes communication and leads to the increased reporting of incidents such as sexual approaches and acts of violence. Further, ICE field offices have local policies that specifically address sexual assaults and its consequences, to include criminal prosecution for prohibited acts of a sexual nature. ICE distributes detainee handbooks, pamphlets, and hand-outs that address sexual awareness and protection. The Prison Rape Elimination Act of 2000 mandates that all correctional facilities have standards that identify and report sexual assaults and rapes. In addition, all ICE contract detention facilities and six of the eight ICE service processing centers currently hold American Correctional Association accreditation, which requires the satisfaction of strict standards for the prevention, protection, reporting, and investigation of sexual assaults and other acts of violence. Also, DHS requires the posting of information regarding how to report incidents of misconduct or violence to the DHS Office of the Inspector General. That information, including toll-free phone numbers, is posted in highly visible areas of all detainee housing so that any detained alien can report an allegation of misconduct or a violent incident directly to the Office of the Inspector General in addition to or in lieu of reporting such assaults to ICE officers, facility staff, or medical personnel.

Similar policies govern the short-term holding facilities operated by U.S. Customs and Border Protection (CBP). To the extent practicable, juveniles, males and females are segregated while detained in such holding facilities, with certain exceptions made for family units (*e.g.* nursing mothers, related adults with infants or toddlers). Juveniles and females are generally detained in attended areas. Where placement in a secure detention area is required, monitoring procedures are strictly followed. Most CBP holding rooms are outfitted with television cameras and all are physically checked on a regular basis. Violent or potentially violent detainees are detained in segregated hard cells where such cells are available.

As discussed previously, allegations of civil rights violations, excessive force or abuse of authority made against DHS employees or contractors are reported to the Joint Intake Center or the ICE Office of Professional Responsibility and are subsequently referred to the DHS Office of the Inspector General. Such allegations also may be reported directly to the Office of the Inspector General. Allegations of criminal or other serious misconduct that the Inspector General declines to pursue are referred to the ICE Office of Professional Responsibility for investigation. Allegations of other, lesser misconduct or policy violations that do not warrant investigation by the Inspector General or the ICE Office of Professional Responsibility may be referred to management for appropriate inquiry and action. . In addition, the Office for Civil Rights and Civil Liberties within DHS has authority to investigate complaints alleging violations of civil rights and civil liberties.

50. How is the use of solitary confinement regulated and how is detainees' mental health monitored (Report of the Special Rapporteur on the question of torture (E/CN.4/2005/62/Add.1), para. 1857.)**? How is prolonged isolation and indefinite detention, with or without charges, compatible with the obligation of the State party under article 16?**

The Bureau of Prisons does not use solitary confinement in its facilities. Bureau facilities needing the option of separating inmates from the general population have Special Housing Units (SHU), which include two categories of cells: disciplinary segregation and administrative detention. Disciplinary segregation housing status is imposed by a Discipline Hearing Officer as a sanction for inmates who commit serious

violations of Bureau rules and is time-limited. Administrative detention housing status is non-punitive in nature – it is used to achieve separation from the general population when the inmate's presence in that population poses a "serious threat to life, property, self, staff or other inmates, or to the security or orderly running" of the facility. It is also used for those needing protective custody, those en route to another institution, or those pending a disciplinary hearing. SHU operations are tightly controlled by policy and regulations. Generally, inmates confined in the Special Housing Unit are placed in two-person cells, recreate outside with at least one other inmate, and have regular and frequent contact with staff, visitors, lawyers, medical personnel, etc. Even in the exceptional case in which a person is placed in a one-person cell, he continues to have such contact with non-inmates and with other inmates also housed in the SHU.

Regarding the Committee's question about the monitoring of detainees' mental health, Bureau of Prisons policy clearly specifies the types and frequency of formal reviews of inmates housed in disciplinary segregation. With respect to mental health monitoring, qualified staff must conduct a psychiatric or psychological assessment (including a personal interview with the inmate), whenever placement in disciplinary segregation continues beyond 30 days. This type of assessment must be repeated thereafter at one month intervals as long as the inmate remains in disciplinary segregation status.

Key institution personnel must make regular visits to the SHU to provide inmates in either status with access to avenues for problem identification and resolution. Internal audits are conducted by specific institution departments to ensure actions required by policy are in fact being completed. This may include, for example, an examination of visiting logs for the SHU to ensure the institution's executive staff, department heads, and a psychologist have conducted rounds as required.

To supplement the shift lieutenant's daily tour of the entire facility, the institution duty officer (IDO) must also visit areas of major activity or special interest daily. The IDO must visit every area of the institution at least once during the week, reporting any significant concerns to the appropriate party immediately. Any staff concerned about an inmate's mental status while in SHU (or anywhere else) may refer the individual

for a mental health evaluation. Having this requirement for visits to SHU provides additional oversight and safeguarding of inmate rights.

Information about the mental health care provided to detainees at Guantanamo is provided in Annex 1.

On the second question, the United States takes exception to the assumption contained in the question that prolonged isolation and indefinite detention *per se* constitutes cruel, inhuman, or degrading treatment or punishment. In any event, under United States criminal law, the United States does not detain individuals convicted of criminal charges indefinitely. Rather, their sentences are imposed for a term of years, or for life, as the case may be, by judges, and if elected by the defendant, by juries of his or her peers. Under the law of war, there is no question that a State is authorized to detain combatants – whether lawful or unlawful – for the duration of the armed conflict without charges.

51. Please provide information in respect of allegations that extreme pain is experienced during the procedure of execution by lethal injection, as the sedative is not properly administrated (Ibid., para. 1858.)**. How are executions monitored, especially those by lethal injection?**

The United States included an understanding in its instrument of ratification of the CAT that the treaty does not "restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." The Supreme Court of the United States has found lethal injection to be consistent with the Constitution, and thus this particular question addresses a question beyond the scope of U.S. obligations under the CAT.

Pursuant to Federal Regulations, 28 CFR Part 26, Federal executions are carried out by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death. Lethal injection was chosen as the method of execution for federal death sentences precisely because it could be carried out with no discomfort to the inmate. The lethal injection procedure is administered by qualified personnel. Federal executions are generally witnessed by ten representatives of the press, eight citizens (who may be victim witnesses), two defense

attorneys of the inmate, one spiritual advisor of the inmate, three adult friends or relatives of the inmate, and appropriate government officials.

The Eighth Amendment's "cruel and unusual punishments" clause applies equally to Federal and State executions. A method of execution may not "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion), or "involve torture or a lingering death," In re Kemmler, 136 U.S. 436, 447 (1890). States use similar lethal injection procedures as those used by the Federal government and do not entail infliction of unnecessary pain or suffering.

52. According to information before the Committee, the State party has authorized the use of interrogation techniques such as 20-hour interrogations, stress positions, isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, use of dogs to instill fear, removal of clothing, forced shaving, use of female interrogators, physical contact and removal of religious items. If this is the case, how does the State party reconcile the use of such techniques with its obligations under article 16 of the Convention? Please provide detailed information on interrogation techniques authorized and practised in Guantánamo Bay, Afghanistan, Iraq, and in other places of detention under the State party's control. Are there any specific rules regarding the use of gender or sexualized practices as methods of interrogation?

The U.S. government is committed to treating all detainees in a manner consistent with the U.S. Constitution, laws, and treaty obligations. These laws now include the Detainee Treatment Act of 2005. Referring to that Act, the President of the United States recently explained that "[o]ur policy has . . . been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute for practices abroad." Although broader in territorial scope than the CAT, this new domestic legislation now prohibits subjecting individuals in U.S. custody or control, "regardless of nationality or physical location," to "cruel, inhuman, or degrading treatment or punishment," as defined by the Senate reservation to Article 16 of the CAT.

With regard to the request for information, the United States Department of Defense, on June 22, 2004, made public the techniques for

interrogation that were in force (prior to December 30, 2005) in Guantanamo. This document can be accessed at http://www.defenselink.mil/releases/2004/nr20040622-0930.html. In Afghanistan and Iraq, forces utilized the techniques that were described in U.S. Army Field Manual 34-52.

In addition, we direct the Committee to the response to Question 26 above, which details the status of interrogation techniques after the Detainee Treatment Act of 2005. According to the Act, "the term 'cruel, unusual, and inhumane treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

53. While acknowledging the federal structure of the State party, it is the federal State that is responsible for the international obligations assumed by the State party under the Convention. Please provide detailed information on the existing mechanisms the State party has to monitor the implementation of the Convention at the state level, in order to fulfill its international obligations under the Convention? Please provide detailed information on the McCain and Graham-Levin amendments as well as on the changes they will introduce to the current legislative, administrative, judicial and other measures preventing cruel, inhuman or degrading treatment or punishment.

As stated above, the United States ratified the Convention after a review that concluded that state and federal laws prohibited the conduct proscribed by the Convention. Consistent with the U.S. statement that was included in the U.S. instrument of ratification to the CAT, the CAT is implemented by the U.S. Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. As explained in the *Initial Report* to the Committee, under the U.S. Constitution, the federal government is a government of limited authority and responsibility. Those powers not delegated to the federal government are specifically reserved to the states and the people. The resulting

division of authority means that state and local governments retain significant responsibility in many areas, including in areas relevant to certain aspects of the implementation of the CAT. Nonetheless, this has not detracted from or limited the substantive obligations regarding the prohibition, prevention, and punishment of torture or cruel, inhuman or degrading treatment or punishment, as defined in the U.S. reservation because the U.S. Constitution prohibits such conduct by state and local government officials. Much of the *Initial Report* to the Committee and the *Second Periodic Report* to the Committee is devoted to discussing the measures taken by state and local governments to fulfill U.S. obligations under the CAT, and we direct the Committee to those reports for further elaboration.

With regard to the final request for information under this topic, the U.S. Government is committed to treating all detainees in a manner consistent with the U.S. Constitution, laws, and treaty obligations. These laws now include the Detainee Treatment Act of 2005. Referring to that Act, the President of the United States recently explained that "[o]ur policy has . . . been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute for practices abroad." Although Article 16 of the CAT applies only to "territory under [the State Party's] jurisdiction," the United States has now voluntarily prohibited as a matter of its domestic law subjecting individuals in U.S. custody or control, "regardless of nationality or physical location," to "cruel, inhuman, or degrading treatment or punishment," as defined by the Senate reservation to Article 16 of the CAT.

The Act provides that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1003, 119 Stat. 2680, 2739-40 (2005). It further provides that "[n]othing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section." It provides that "[i]n this section, the term 'cruel, inhuman, or degrading treatment or punishment' means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the

United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984."

The Act also amends the federal *habeas corpus* statute, 28 U.S.C. § 2241, to provide that "no court, justice, or judge shall have jurisdiction to hear or consider" (1) "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba;" or (2) "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—(A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth [elsewhere in the Amendment] to have been properly detained as an enemy combatant." Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e), 119 Stat. 2680, 2742 (2005). The Act also provides that, subject to its specifications, "the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity" of (1) "any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant," or (2) "any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)."

Under the Act, the jurisdiction of the U.S. Court of Appeals for the District of Columbia Circuit to review any final decision of a Combatant Status Review Tribunal is "limited to claims brought by or on behalf of an alien—(i) who is, at the time a request for review by such court is filed, detained by the Department of Defense at Guantanamo Bay, Cuba; and (ii) for whom a Combatant Status Review Tribunal has been conducted, pursuant to applicable procedures specified by the Secretary of Defense." Moreover, the court's jurisdiction over any such claims is "limited to the consideration of—(i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals . . . ; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United

States." With respect to Military Commissions, the court's review of any final decision of a Military Commission is available as a matter of right for capital cases or those in which the alien was sentenced to 10 years or more of prison. With respect to any other case, it is at the court's discretion. The court's jurisdiction to review any final decision of a Military Commission is "limited to an appeal brought by or on behalf of an alien—(i) who was, at the time of the proceedings . . . , detained by the Department of Defense at Guantanamo Bay, Cuba; and (ii) for whom a final decision has been rendered pursuant to such military order." The jurisdiction of the court is "limited to the consideration of—(i) whether the final decision was consistent with the standards and procedures specified in the military order . . . ; and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."

Other issues

54. Is the State party considering making the declaration under article 22, recognizing the competence of the Committee to receive and consider individual communications?

As it explained in paragraph 163 of the *Second Periodic Report*, the United States is not considering making the declaration under article 22. At the time it undertook its domestic procedures to become a State Party to the Convention, the United States Executive and Legislative Branches gave substantial thought to the question of whether to avail the United States of the procedure set forth in Article 22. Since that time, the United States has further considered whether to make a declaration recognizing the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by the United States. While noting that at any time it could decide to reconsider the issue, the United States continues to decline to make such a declaration. As the United States explained at considerable length throughout the *Initial Report* and *Second Periodic Report,* the United States' legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations. Accordingly, the United States will continue to direct its resources to addressing and dealing with violations of the Convention pursuant to operation of its own domestic legal system.

55. Is the State party considering withdrawing any of its reservations to the Convention, as they might be interpreted, and applied, as limiting the full application of the Convention?

As it noted in paragraph 156 of the *Second Periodic Report*, the United States reached its conclusion that it would be necessary to condition U.S. ratification of the Convention on certain reservations, understandings and declarations as a result of a serious and careful review of U.S. law. The *Initial Report* set forth the rationale for each of those reservations, understandings and declarations. While the United States has considered its existing reservations, understandings and declarations in light of the Committee's recommendation to withdraw them, there have been no developments in the interim that have caused the United States to revise its view of the continuing validity and necessity of the conditions set forth in its instrument of ratification.

56. Does the State party envisage ratifying the Optional Protocol to the Convention? If so, has the State party taken any steps to set up or designate a national mechanism that would conduct periodic visits to places of deprivation of liberty in order to prevent torture or other cruel, inhuman or degrading treatment or punishment?

The United States is not considering ratification of the Optional Protocol to the Convention Against Torture. Throughout the negotiations of this instrument, the United States engaged constructively to improve the instrument. However, ultimately those changes were not accepted. Because, in the view of the United States, the Optional Protocol will not substantially contribute to the eradication of torture, the United States has declined to ratify the instrument.

Moreover, as noted in response to question 54 above and throughout the *Initial Report* and *Second Periodic Report*, the United States' legal system affords numerous opportunities for individuals to complain of abuse, and to seek remedies for such alleged violations. Additionally, numerous mechanisms are available to the Department of Justice to ensure that the civil rights of persons in detention in the United States are protected and various remedies and protections are available that individuals may seek in federal, state and administrative proceedings, as described in further detail in response to Question 5 above.

Accordingly, the United States will continue to direct its resources to addressing and dealing with violations of the Convention pursuant to operation of its own domestic legal system.

57. Please indicate whether the State party's legislation prevents and prohibits the production, trade, import, export and use of equipment specifically designed to inflict torture or other cruel, inhuman or degrading treatment. If so, please provide information about its content and implementation. If not, please indicate whether the adoption of such legislation is being actively considered.

The United States recognizes that trade and export of certain items should be controlled to prevent their misuse. Under the Export Administration Regulations, the export of such items requires a special license. Human rights vetting is a prerequisite for the issuance of such licenses. Items specifically designed for the use of torture would never receive such a license. The United States has also considered that there are many items that have permissible uses that may also be used for torture. The United States does not prevent or prohibit the production of such items.

58. Please provide information on the legislative, administrative and other measures the State party has taken to respond to the threats of terrorism, and please describe if, and how, these measures have affected human rights safeguards in law and practice. Please describe the relevant training given to law enforcement officers, the legal remedies available to persons subjected to anti-terrorist measures, the number of complaints of non-observance of international standards, and the outcome of these complaints.

This question raises issues outside the ambit of the Convention. Relevant issues are discussed at various locations within the *Second Periodic Report*. For other information, the Committee may wish to refer to the latest U.S. Periodic Report to the Committee on Human Rights.

59. Please provide information on the legislative and other measures the State party has taken to prevent domestic violence and to classify acts of domestic violence as specific offences under the criminal law.

Many acts of domestic violence are crimes under the laws in effect in the United States, and the United States has many programs aimed at deterring and punishing such acts and at helping the victims of such acts. With respect, however, the United States regards this question to be outside the mandate of the Committee, since the Convention relates to acts committed by officials or agents of officials. Nonetheless, the Committee may wish to refer to the latest U.S. Periodic Report to the Human Rights Committee. That Report deals extensively with this subject, both within the body of the Report and in its Annex.

List of Annexes

Annex 1 (Question 6)
Information on Medical Care Provided to Detainees

Annex 2 (Question 13)
Regulations Relating to Implementation of CAT Article 3 in the Immigration Removal and Extradition Contexts

Annex 3 (Question 24)
Information about Training for Military Personnel and Other Persons Working with Detainees

Annex 4 (Question 30)
Statistical Data on Deaths in Bureau of Prisons Facilities

Annex 5 (Question 30)
Statistical Data on Deaths in Immigration and Customs Enforcement Facilities

Annex 6 (Question 30)
Statistical Data on Deaths in Customs and Border Protection Facilities

Annex 7 (Questions 30, 32, and 33)
Statistical Data on Deaths under Department of Defense Control

Annex 8 (Question 36)
Compensation Claims Filed with Army

Annex 1 (Question 6)
Information on Medical Care Provided to Detainees

It is the Policy of the Department of Defense to provide detainees under its control with access to medical care similar to that which it provides U.S. service members. U.S. military medical staff have provided detainees with first-aid and emergency care to treat combat wounds, provided detainees with artificial limbs, conducted dental examinations, issued inoculations, conducted complex surgery to repair serious, sometimes otherwise fatal, congenital defects, and a wide-range of medical services from the mundane to life-saving medical procedures. In short, the U.S. Government provides detainees with a very high standard of medical care and attention, consistent with the values of the United States.

As a practical matter, it is difficult for the Department of Defense to aggregate for the Committee all of the medical activity in all theatres. However, we believe it may be helpful to provide information on Guantanamo, a facility where the United States has been accused of not providing superior medical care, to demonstrate the processes and resources the United States has made to detainees under its control. The examples raised in this section can be found in other theatres – our policy remains to provide detainees medical care similar to that which we provide our own forces in theatre.

Access to Medical Care for Guantanamo Detainees

Detainee hospital statistics show an average of more than 2500 clinic, sick call, or specialty visits per month for a detainee population of about 500. Medical services are available 24 hours a day, 7 days a week by a corps staff currently consisting of 7 physicians, 17 nurses, and 83 corpsman. Any detainee can request medical care at any time by making a request to a guard or to medical personnel who make rounds on the cellblock every other day.

The facility at Guantanamo features an outpatient clinic, an inpatient detention hospital, and an inpatient behavioral health unit structured much like any other Department of Defense medical facility. When the medical professionals who staff these facilities are not

deployed to Guantanamo, they provide care to United States service members, their families, and retirees. Full ancillary services are also available, including laboratory, radiology, and pharmacy services. In addition, supplemental services are available at the Naval Base Hospital including an Acute Care Unit dedicated to the treatment of detainees.

All specialty care (including cardiology, gastroenterology, dermatology and others) is available on a routinely or on an emergency basis if needed. Over the past 12 months, 17 specialty clinics have been conducted for the detainees. In support of unexpected medical needs, augmentation staff can be readily mobilized. During the recent hunger strike, for example, two teams totaling 6 physicians, 11 nurses, one dietician, one physical therapist, and 25 corpsman/technicians aided in delivery over 400 feedings without a complication.

Behavior health services are available for the approximately 22% of detainees with a mental health diagnosis. Currently, this service is actively following and treating 8% of the detainee population.

The dental service has seen 322 visits since November 2005 and completed 168 treatment plans, including 35 cleanings, 91 cavities filled, 36 root canals and 6 oral surgeries. The remaining dental treatment plans are in progress.

Scope of Care for Guantanamo Detainees

Since 2002 there have been 275 surgical cases or procedures. Initial cases were predominately orthopedic to repair battlefield injuries or remove shrapnel. Recent cases are focused predominately on hernia repairs, occasional appendectomies, and tonsillectomy or hemorrhoid removal. There has been one total thymectomy for a malignant thymoma and placement of cardiac stints in another patient.

General medical problems among the detainees, whose ages range from the 20's to the mid 60's, are followed using the same guidelines as in a military treatment facility. For example, some of the medical conditions currently being monitored include cardiac disease (7 cases), hypertension (12 cases), diabetes (8 cases), and gastrointestinal disorders (30 cases).

Physical therapy averages 7 patients per day in support of rehabilitation for battlefield injuries or prosthetic care/training. There have been 22 prosthetic appliances provided to the detainees since 2002.

Behavioral health services are available for the approximately 22% of detainees with a mental health diagnosis. Currently, this service is actively following and treating 8% of the detainee population and is staffed with a board certified psychiatrist and psychologist.

Full scope eye care is made available to all detainees. Optometry delivers primary eye care and averages 45 routine exams per month and has dispensed 174 pairs of eyeglasses over the last year. Ophthalmology is available for surgical eye care when needed.

Preventative Medical Care for Guantanamo Detainees

Twelve colonoscopies have been performed as part of colon-cancer screening where age appropriate.

The following immunizations recommended by the Centers for Disease Control have been offered to this group of detainees, whose immunization status has generally been poor:

Diphtheria and Tetanus series:	98% completed
Measles, Mumps & Rubella:	100% completed
Hepatitis A & B series	86% completed
Influenza vaccine:	32% completed
Annual PPD monitoring:	38% completed

Involuntary Feeding Procedures

With regard to involuntary feeding that has been medically necessary to maintain human life in some cases as a result of a hunger strike, the fundamental focus of Department of Defense policy on the prevention of loss of life through standard medical intervention using means that are clinically appropriate, humane, and in accordance with all applicable laws and procedures and medical ethics. The focus at Guantanamo is safe, humane, care and custody of all detainees.

Medical professionals provide regular and detailed warnings to detainees concerning the dangers of failure to eat or drink. All efforts are being made by medical personnel to counsel detainees to end the strike, including by making detainees aware that continuation of the hunger strike could endanger their health or life. The Department of Defense has brought in medical specialists, including nutritionists and behavioral health professionals to increase monitoring or provide any specialized care.

Only when previous protocols failed to eliminate the threat to the health of the detainees did dedicated medical professionals conduct involuntary feedings in a careful, compassionate, and humane manner using a U.S. Federal Bureau of Prisons' model for feeding hunger strikers.

Annex 2 (Question 13)
Regulations Relating to Implementation of CAT Article 3 in the Immigration Removal and Extradition Contexts

Code of Federal Regulations Currentness

Title 22. Foreign Relations

Chapter I. Department of STATE

Subchapter J. Legal and Related Services

Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

→§ 95.4 Review and construction.

Decisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review. Furthermore, pursuant to section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, notwithstanding any other provision of law, no court shall have jurisdiction to review these regulations, and nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

AUTHORITY: 18 U.S.C. 3181 et seq.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

22 C. F. R. § 95.4, 22 CFR § 95.4

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)

Subpart A. Asylum and Withholding of Removal

➡§ 208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) Reasonableness of internal relocation. For purposes of determinations under paragraphs (b)(1) and (b)(2) of this section, adjudicators should consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that under all the circumstances it would be reasonable for the applicant to relocate.

(c) Eligibility for withholding of removal under the Convention Against Torture.

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) Mandatory denials. Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(3) Exception to the prohibition on withholding of deportation in certain cases. Section 243(h)(3) of the Act, as added by section 413 of Pub.L. 104- 132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) Reconsideration of discretionary denial of asylum. In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation or removal under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him or her, the denial of asylum shall be reconsidered. Factors to be considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his or her spouse or minor children in a third country.

(f) Removal to third country. Nothing in this section or § 208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

[64 FR 8488, Feb. 19, 1999; 65 FR 76135, Dec. 6, 2000]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

8 C. F. R. § 208.16, 8 CFR § 208.16

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)

Subpart A. Asylum and Withholding of Removal

→§ 208.17 Deferral of removal under the Convention Against Torture.

(a) Grant of deferral of removal. An alien who: has been ordered removed; has been found under § 208.16(c)(3) to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), shall be granted deferral of removal to the country where he or she is more likely than not to be tortured.

(b) Notice to alien.

(1) After an immigration judge orders an alien described in paragraph (a) of this section removed, the immigration judge shall inform the alien that his or her removal to the country where he or she is more likely than not to be tortured shall be deferred until such time as the deferral is terminated under this section. The immigration judge shall inform the alien that deferral of removal:

(i) Does not confer upon the alien any lawful or permanent immigration status in the United States;

(ii) Will not necessarily result in the alien being released from the custody of the Service if the alien is subject to such custody;

(iii) Is effective only until terminated; and

(iv) Is subject to review and termination if the immigration judge determines that it is not likely that the alien would be tortured in the country to which removal has been deferred, or if the alien requests that deferral be terminated.

(2) The immigration judge shall also inform the alien that removal has been deferred only to the country in which it has been determined that the alien is likely to be tortured, and that the alien may be removed at any time to another country where he or she is not likely to be tortured.

(c) Detention of an alien granted deferral of removal under this section. Nothing in this section shall alter the authority of the Service to detain an alien whose removal has been deferred under this section and who is otherwise subject to detention. In the case of such an alien, decisions about the alien's release shall be made according to part 241 of this chapter.

(d) Termination of deferral of removal.

(1) At any time while deferral of removal is in effect, the INS District Counsel for the District with jurisdiction over an alien whose removal has been deferred under paragraph (a) of this section may file a motion with the Immigration Court having administrative control pursuant to § 3.11 of this chapter to schedule a hearing to consider whether deferral of removal should be terminated. The Service motion shall be granted if it is accompanied by evidence that is relevant to the possibility that the alien would be tortured in the country to which removal has been deferred and that was not presented at the previous hearing. The Service motion shall not be subject to the requirements for reopening in § § 3.2 and 3.23 of this chapter.

(2) The Immigration Court shall provide notice to the alien and the Service of the time, place, and date of the termination hearing. Such notice shall inform the alien that the alien may supplement the information in his or her initial application for withholding of removal under the Convention Against Torture and shall provide that the alien must submit any such supplemental information within 10 calendar days of service of such notice (or 13 calendar days if service of such notice was by mail). At the expiration of this 10 or 13 day period, the Immigration Court shall forward a copy of the original application, and any supplemental information the alien or the Service has submitted, to the Department of State, together with notice to the Department of State of the time, place and date of the termination hearing. At its option, the Department of State may provide comments on the case, according to the provisions of § 208.11 of this part.

(3) The immigration judge shall conduct a hearing and make a de novo determination, based on the record of proceeding and initial application in addition to any new evidence submitted by the Service or the alien, as to whether the alien is more likely than not to be tortured in the country to which removal has been deferred. This determination shall be made under the standards for eligibility set out in § 208.16(c). The burden is on the alien to establish that it is more likely than not that he or she would be tortured in the country to which removal has been deferred.

(4) If the immigration judge determines that the alien is more likely than not to be tortured in the country to which removal has been deferred, the order of deferral shall remain in place. If the immigration judge determines that the alien has not established that he or she is more likely than not to be tortured in the country to which removal has been deferred, the deferral of removal shall be terminated and the alien may be removed to that country. Appeal of the immigration judge's decision shall lie to the Board.

(e) Termination at the request of the alien.

(1) At any time while deferral of removal is in effect, the alien may make a written request to the Immigration Court having administrative control pursuant to § 3.11 of this chapter to terminate the deferral order. If satisfied on the basis of the written submission that the alien's request is knowing and voluntary, the immigration judge shall terminate the order of deferral and the alien may be removed.

(2) If necessary the immigration judge may calendar a hearing for the sole purpose of determining whether the alien's request is knowing and voluntary. If the immigration judge determines that the alien's request is knowing and voluntary, the order of deferral shall be terminated. If the immigration judge determines that the alien's request is not knowing and voluntary, the alien's request shall not serve as the basis for terminating the order of deferral.

(f) Termination pursuant to § 208.18(c). At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in § 208.18(c).

[64 FR 8489, Feb. 19, 1999]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

8 C. F. R. § 208.17, **8 CFR § 208.17**

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)

Subpart A. Asylum and Withholding of Removal

→§ 208.18 Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(b) Applicability of § § 208.16(c) and 208.17(a)--

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

(2) Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999. An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 208.16(c). Such motions shall be governed by § § 3.23 and 3.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under § § 208.16(c) or 208.17(a).

(3) Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.

(i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under § § 208.16(c) or 208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under § § 208.16(c) or 208.17(a) shall not be subject to the requirements for reopening in § § 3.2 and 3.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 208.16(c) or deferral of removal under § 208.17(a) will be considered under § 208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 208.18(d) and 235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999. Sections 208.16(c) and 208.17 (a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for

protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have been finally denied withholding of removal under § 208.16(c) and deferral of removal under § 208.17(a).

(c) Diplomatic assurances against torture obtained by the Secretary of State.

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) Cases involving aliens ordered removed under section 235(c) of the Act. With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal

pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.

[64 FR 8490, Feb. 19, 1999; 64 FR 13881, March 23, 1999]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

8 C. F. R. § 208.18, **8 CFR § 208.18**

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)

Subpart B. Credible Fear of Persecution

→§ 208.30 Credible fear determinations involving stowaways and applicants for admission found inadmissible pursuant to section 212(a)(6)(C) or 212(a)(7) of the Act.

(a) Jurisdiction. The provisions of this subpart apply to aliens subject to sections 235(a)(2) and 235(b)(1) of the Act. Pursuant to section 235(b)(1)(B) of the Act, the Service has exclusive jurisdiction to make credible fear determinations, and the Executive Office for Immigration Review has exclusive jurisdiction to review such determinations. Except as otherwise provided in this subpart, paragraphs (b) through (g) of this section are the exclusive procedures applicable to credible fear interviews, determinations, and reviews under section 235(b)(1)(B) of the Act.

(b) Treatment of dependents. A spouse or child of an alien may be included in that alien's credible fear evaluation and determination, if such spouse or child:

(1) Arrived in the United States concurrently with the principal alien; and

(2) Desires to be included in the principal alien's determination. However, any alien may have his or her credible fear evaluation and determination made separately, if he or she expresses such a desire.

(c) Authority. Asylum officers conducting credible fear interviews shall have the authorities described in § 208.9(c).

(d) Interview. The asylum officer, as defined in section 235(b)(1)(E) of the Act, will conduct the interview in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture, and shall conduct the interview as follows:

(1) If the officer conducting the credible fear interview determines that the alien is unable to participate effectively in the interview because of illness, fatigue, or other impediments, the officer may reschedule the interview.

(2) At the time of the interview, the asylum officer shall verify that the alien has received Form M-444, Information about Credible Fear Interview in Expedited Removal Cases. The officer shall also determine that the alien has an understanding of the credible fear determination process.

(3) The alien may be required to register his or her identity electronically or through any other means designated by the Attorney General.

(4) The alien may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, and may present other evidence, if available. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process. Any person or persons with whom the alien chooses to consult may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and on the length of the statement.

(5) If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter must be at least 18 years of age and may not be the applicant's attorney or representative of record, a witness testifying on the applicant's behalf, a representative or employee of the applicant's country of nationality, or, if the applicant is stateless, the applicant's country of last habitual residence.

(6) The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct any errors therein.

(e) Determination.

(1) The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear of persecution or torture.

(2) An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.

(3) An alien will be found to have a credible fear of torture if the alien shows that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture, pursuant to 8 CFR 208.16 or 208.17.

(4) In determining whether the alien has a credible fear of persecution, as defined in section 235(b)(1)(B)(v) of the Act, or a credible fear of torture, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

(5) Except as provided in paragraph (e)(6) of this section, if an alien is able to establish a credible fear of persecution or torture but appears to be subject to one or more of the mandatory bars to applying for, or being granted, asylum contained in section 208(a)(2) and 208(b)(2) of the Act, or to withholding of removal contained in section 241(b)(3)(B) of the Act, the Department of Homeland Security shall nonetheless place the alien in proceedings under section 240 of the Act for full consideration of the alien's claim, if the alien is not a stowaway. If the alien is a stowaway, the Department shall place the alien in proceedings for consideration of the alien's claim pursuant to 8 CFR 208.2(c)(3).

(6) Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

(i) If the asylum officer, with concurrence from a supervisory asylum officer, determines that an alien does not qualify for an exception under the Agreement during this threshold screening interview, the alien is ineligible to apply for asylum in the United States. After the asylum officer's documented finding is reviewed by a supervisory asylum officer, the alien shall be advised that he or she will be removed to Canada in order to pursue his or her claims relating to a fear of persecution or torture under Canadian law. Aliens found ineligible to apply for asylum under this paragraph shall be removed to Canada.

(ii) If the alien establishes by a preponderance of the evidence that he or she qualifies for an exception under the terms of the Agreement, the asylum officer shall make a written notation of the basis of the exception, and then proceed immediately to a determination concerning whether the alien has a credible fear of persecution or torture under paragraph (d) of this section.

(iii) An alien qualifies for an exception to the Agreement if the alien is not being removed from Canada in transit through the United States and

(A) Is a citizen of Canada or, not having a country of nationality, is a habitual resident of Canada;

(B) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who has been granted asylum, refugee,

or other lawful status in the United States, provided, however, that this exception shall not apply to an alien whose relative maintains only nonimmigrant visitor status, as defined in section 101(a)(15)(B) of the Act, or whose relative maintains only visitor status based on admission to the United States pursuant to the Visa Waiver Program;

(C) Has in the United States a spouse, son, daughter, parent, legal guardian, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew who is at least 18 years of age and has an asylum application pending before U.S. Citizenship and Immigration Services, the Executive Office for Immigration Review, or on appeal in federal court in the United States;

(D) Is unmarried, under 18 years of age, and does not have a parent or legal guardian in either Canada or the United States;

(E) Arrived in the United States with a validly issued visa or other valid admission document, other than for transit, issued by the United States to the alien, or, being required to hold a visa to enter Canada, was not required to obtain a visa to enter the United States; or

(F) The Director of USCIS, or the Director's designee, determines, in the exercise of unreviewable discretion, that it is in the public interest to allow the alien to pursue a claim for asylum, withholding of removal, or protection under the Convention Against Torture, in the United States.

(iv) As used in 8 CFR 208.30(e)(6)(iii)(B), (C) and (D) only, "legal guardian" means a person currently vested with legal custody of such an alien or vested with legal authority to act on the alien's behalf, provided that such an alien is both unmarried and less than 18 years of age, and provided further that any dispute with respect to whether an individual is a legal guardian will be resolved on the basis of U.S. law.

(7) An asylum officer's determination shall not become final until reviewed by a supervisory asylum officer.

(f) Procedures for a positive credible fear finding. If an alien, other than an alien stowaway, is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-862, Notice to Appear, for full consideration of the asylum and withholding of removal claim in proceedings under section 240 of the Act. If an alien stowaway is found to have a credible fear of persecution or torture, the asylum officer will so inform the alien and issue a Form I-863, Notice of Referral to Immigration Judge, for full consideration of the asylum claim, or the withholding of removal claim, in proceedings under § 208.2(c). Parole of the alien may be considered only in accordance with section 212(d)(5) of the Act and § 212.5 of this chapter.

(g) Procedures for a negative credible fear finding.

(1) If an alien is found not to have a credible fear of persecution or torture, the asylum officer shall provide the alien with a written notice of decision and inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-869, Record of Negative Credible Fear Finding and Request for Review by Immigration Judge. The alien shall indicate whether he or she desires such review on Form I-869. A refusal by the alien to make such indication shall be considered a request for review.

(i) If the alien requests such review, or refuses to either request or decline such review, the asylum officer shall arrange for detention of the alien and serve him or her with a Form I-863, Notice of Referral to Immigration Judge, for review of the credible fear determination in accordance with paragraph (f)(2) of this section.

(ii) If the alien is not a stowaway and does not request a review by an immigration judge, the officer shall order the alien removed and issue a Form I-860, Notice and Order of Expedited Removal, after review by a supervisory asylum officer.

(iii) If the alien is a stowaway and the alien does not request a review by an immigration judge, the asylum officer shall refer the alien to the district director for completion of removal proceedings in accordance with section 235(a)(2) of the Act.

(2) Review by immigration judge of a negative credible fear finding.

(i) Immigration judges will review negative credible fear findings as provided in 8 CFR 1208.30(g)(2).

(ii) The record of the negative credible fear determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination.

[64 FR 8492, Feb. 19, 1999; 65 FR 76136, Dec. 6, 2000; 69 FR 69488, Nov. 29, 2004]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003,

unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

8 C. F. R. § 208.30, **8 CFR § 208.30**

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 208. Procedures for Asylum and Withholding of Removal (Refs & Annos)

Subpart B. Credible Fear of Persecution

➡§ 208.31 Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

(a) Jurisdiction. This section shall apply to any alien ordered removed under section 238(b) of the Act or whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the administrative removal or reinstatement process, expresses a fear of returning to the country of removal. The Service has exclusive jurisdiction to make reasonable fear determinations, and EOIR has exclusive jurisdiction to review such determinations.

(b) Initiation of reasonable fear determination process. Upon issuance of a Final Administrative Removal Order under § 238.1 of this chapter, or notice under § 241.8(b) of this chapter that an alien is subject to removal, an alien described in paragraph (a) of this section shall be referred to an asylum officer for a reasonable fear determination. In the absence of exceptional circumstances, this determination will be conducted within 10 days of the referral.

(c) Interview and procedure. The asylum officer shall conduct the interview in a non-adversarial manner, separate and apart from the general public. At the time of the interview, the asylum officer shall determine that the alien has an understanding of the reasonable fear determination process. The alien may be represented by counsel or an accredited representative at the interview, at no expense to the Government, and may present evidence, if available, relevant to the possibility of persecution or torture. The alien's representative may present a statement at the end of the interview. The asylum officer, in his or her discretion, may place reasonable limits on the number of persons who may be present at the interview and the length of the statement. If the alien is unable to proceed effectively in English, and if the asylum officer is unable to proceed competently in a language chosen by the alien, the asylum officer shall arrange for the assistance of an interpreter in conducting the interview. The interpreter may not be a representative or employee of the applicant's country or nationality, or if the applicant is stateless, the applicant's country of last habitual residence. The asylum officer shall create a summary of the material facts as stated by the applicant. At the conclusion of the interview, the officer shall review the summary with the alien and provide the alien with an opportunity to correct errors therein. The asylum officer shall create a written record of his or her determination, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officers, and the officer's determination of whether, in light of such facts, the alien has established a reasonable fear of persecution or torture. The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

(d) Authority. Asylum officers conducting screening determinations under this section shall have the authority described in § 208.9(c).

(e) Referral to Immigration Judge. If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals.

(f) Removal of aliens with no reasonable fear of persecution or torture. If the asylum officer determines that the alien has not established a reasonable fear of persecution or torture, the asylum officer shall inform the alien in writing of the decision and shall inquire whether the alien wishes to have an immigration judge review the negative decision, using Form I-898, Record of Negative Reasonable Fear Finding and Request for Review by Immigration Judge, on which the alien shall indicate whether he or she desires such review.

(g) Review by immigration judge. The asylum officer's negative decision regarding reasonable fear shall be subject to review by an immigration judge upon the alien's request. If the alien requests such review, the asylum officer shall serve him or her with a Form I-863. The record of determination, including copies of the Form I-863, the asylum officer's notes, the summary of the material facts, and other materials upon which the determination was based shall be provided to the immigration judge with the negative determination. In the absence of exceptional circumstances, such review shall be

conducted by the immigration judge within 10 days of the filing of the Form I-863 with the immigration court. Upon review of the asylum officer's negative reasonable fear determination:

(1) If the immigration judge concurs with the asylum officer's determination that the alien does not have a reasonable fear of persecution or torture, the case shall be returned to the Service for removal of the alien. No appeal shall lie from the immigration judge's decision.

(2) If the immigration judge finds that the alien has a reasonable fear of persecution or torture, the alien may submit Form I-589, Application for Asylum and Withholding of Removal.

(i) The immigration judge shall consider only the alien's application for withholding of removal under § 208.16 and shall determine whether the alien's removal to the country of removal must be withheld or deferred.

(ii) Appeal of the immigration judge's decision whether removal must be withheld or deferred lies to the Board of Immigration Appeals. If the alien or the Service appeals the immigration judge's decision, the Board shall review only the immigration judge's decision regarding the alien's eligibility for withholding or deferral of removal under § 208.16.

[64 FR 8493, Feb. 19, 1999; 64 FR 13881, March 23, 1999]

SOURCE: 62 FR 10337, March 6, 1997; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1103, 1158, 1226, 1252, 1282; 8 CFR part 2.

8 C. F. R. § 208.31, **8 CFR § 208.31**

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 8. Aliens and Nationality

Chapter I. Department of Homeland Security (Immigration and Naturalization) (Refs & Annos)

Subchapter B. Immigration Regulations

Part 235. Inspection of Persons Applying for Admission (Refs & Annos)

➡§ 235.8 Inadmissibility on security and related grounds.

(a) Report. When an immigration officer or an immigration judge suspects that an arriving alien appears to be inadmissible under section 212(a)(3)(A) (other than clause (ii)), (B), or (C) of the Act, the immigration officer or immigration judge shall order the alien removed and report the action promptly to the district director who has administrative jurisdiction over the place where the alien has arrived or where the hearing is being held. The immigration officer shall, if possible, take a brief sworn question-and-answer statement from the alien, and the alien shall be notified by personal service of Form I-147, Notice of Temporary Inadmissibility, of the action taken and the right to submit a written statement and additional information for consideration by the Attorney General. The district director shall forward the report to the regional director for further action as provided in paragraph (b) of this section.

(b) Action by regional director.

(1) In accordance with section 235(c)(2)(B) of the Act, the regional director may deny any further inquiry or hearing by an immigration judge and order the alien removed by personal service of Form I-148, Notice of Permanent Inadmissibility, or issue any other order disposing of the case that the regional director considers appropriate.

(2) If the regional director concludes that the case does not meet the criteria contained in section 235(c)(2)(B) of the Act, the regional director may direct that:

(i) An immigration officer shall conduct a further examination of the alien, concerning the alien's admissibility; or,

(ii) The alien's case be referred to an immigration judge for a hearing, or for the continuation of any prior hearing.

(3) The regional director's decision shall be in writing and shall be signed by the regional director. Unless the written decision contains confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security of the United States, the written decision shall be served on the alien. If the written decision contains such confidential information, the alien

shall be served with a separate written order showing the disposition of the case, but with the confidential information deleted.

(4) The Service shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act or Article 3 of the Convention Against Torture. The provisions of part 208 of this chapter relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(c) Finality of decision. The regional director's decision under this section is final when it is served upon the alien in accordance with paragraph (b)(3) of this section. There is no administrative appeal from the regional director's decision.

(d) Hearing by immigration judge. If the regional director directs that an alien subject to removal under this section be given a hearing or further hearing before an immigration judge, the hearing and all further proceedings in the matter shall be conducted in accordance with the provisions of section 240 of the Act and other applicable sections of the Act to the same extent as though the alien had been referred to an immigration judge by the examining immigration officer. In a case where the immigration judge ordered the alien removed pursuant to paragraph (a) of this section, the Service shall refer the case back to the immigration judge and proceedings shall be automatically reopened upon receipt of the notice of referral. If confidential information, not previously considered in the matter, is presented supporting the inadmissibility of the alien under section 212(a)(3)(A) (other than clause (ii)), (B) or (C) of the Act, the disclosure of which, in the discretion of the immigration judge, may be prejudicial to the public interest, safety, or security, the immigration judge may again order the alien removed under the authority of section 235(c) of the Act and further action shall be taken as provided in this section.

(e) Nonapplicability. The provisions of this section shall apply only to arriving aliens, as defined in § 1.1(q) of this chapter. Aliens present in the United States who have not been admitted or paroled may be subject to proceedings under Title V of the Act.

[22 FR 9791, Dec. 6, 1957; 22 FR 9519, Nov. 28, 1957, as amended at 37 FR 11470, June 8, 1972; 46 FR 8, Jan. 3, 1983; 48 FR 30350, July 1, 1983; 62 FR 10358, March 6, 1997; 64 FR 8494, Feb. 19, 1999]

SOURCE: 53 FR 23380, June 22, 1988; 53 FR 30021, Aug. 10, 1988; 54 FR 101, Jan. 4, 1989; 56 FR 50812, Oct. 9, 1991; 62 FR 10353, March 6, 1997; 67 FR 71449, Dec. 2, 2002; 68 FR 10923, March 6, 2003; 68 FR 35275, June 13, 2003; 69 FR 480, Jan. 5, 2004, unless otherwise noted.

AUTHORITY: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731-32.

8 C. F. R. § 235.8, **8 CFR § 235.8**

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 22. Foreign Relations

Chapter I. Department of STATE

Subchapter J. Legal and Related Services

Part 95. Implementation of Torture Convention in Extradition Cases

AUTHORITY: 18 U.S.C. 3181 et seq.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

C. F. R. T. 22, Ch. I, Subch. J, Pt. 95, Refs & Annos, CFR T. 22, Ch. I, Subch. J, Pt. 95, Refs & Annos

Current through December 28, 2005; 70 FR 76935

Effective: [See Text Amendments]

Code of Federal Regulations Currentness

Title 22. Foreign Relations

Chapter I. Department of STATE

Subchapter J. Legal and Related Services

Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

➡§ 95.1 Definitions.

(a) Convention means the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, done at New York on December 10, 1984, entered into force for the United States on November 10, 1994. Definitions provided below in paragraphs (b) and (c) of this section reflect the language of the Convention and understandings set forth in the United States instrument of ratification to the Convention.

(b) Torture means:

(1) Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

(2) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or

suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(3) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(4) This definition of torture applies only to acts directed against persons in the offender's custody or physical control.

(5) The term "acquiescence" as used in this definition requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(6) The term "lawful sanctions" as used in this definition includes judicially imposed sanctions and other enforcement actions authorized by law, provided that such sanctions or actions were not adopted in order to defeat the object and purpose of the Convention to prohibit torture.

(7) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.

(c) Where there are substantial grounds for believing that [a fugitive] would be in danger of being subjected to torture means if it is more likely than not that the fugitive would be tortured.

(d) Secretary means Secretary of State and includes, for purposes of this rule, the Deputy Secretary of State, by delegation.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

AUTHORITY: 18 U.S.C. 3181 et seq.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

22 C. F. R. § 95.1, 22 CFR § 95.1

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 22. Foreign Relations

Chapter I. Department of STATE

Subchapter J. Legal and Related Services

Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

➡§ 95.2 Application.

(a) Article 3 of the Convention imposes on the parties certain obligations with respect to extradition. That Article provides as follows:

(1) No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(b) Pursuant to sections 3184 and 3186 of Title 18 of the United States Criminal Code, the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition. In order to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. "is more likely than not" to be tortured in the State requesting extradition when appropriate in making this determination.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

AUTHORITY: 18 U.S.C. 3181 et seq.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

22 C. F. R. § 95.2, 22 CFR § 95.2

Current through December 28, 2005; 70 FR 76935

Code of Federal Regulations Currentness

Title 22. Foreign Relations

Chapter I. Department of STATE

Subchapter J. Legal and Related Services

Part 95. Implementation of Torture Convention in Extradition Cases (Refs & Annos)

→§ 95.3 Procedures.

(a) Decisions on extradition are presented to the Secretary only after a fugitive has been found extraditable by a United States judicial officer. In each case where allegations relating to torture are made or the issue is otherwise brought to the Department's attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.

(b) Based on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.

SOURCE: 64 FR 9437, Feb. 26, 1999, unless otherwise noted.

AUTHORITY: 18 U.S.C. 3181 et seq.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

22 C. F. R. § 95.3, 22 CFR § 95.3

Current through December 28, 2005; 70 FR 76935

Annex 3 (Question 24)

Information about Training for Military Personnel and Other Persons Working with Detainees

Training on the law of war, including the prohibition against torture, is an annual training requirement for the members of every service and for every person, including DoD contractor personnel, who are involved in detainee operations.

Service and Multi-Service level tactics, techniques and procedures (TTP) provide the basis for the majority of warfighter education and training with respect to the day-to-day tactical-level execution of detainee and interrogation operations. TTP is systematically revised in accordance with Service policy.

Theater specific training is a function of the Combatant Command (COCOM) Commander's guidance and is conducted during service pre-deployment training.

With respect to education and mechanisms of systematic review, joint education and training are derived from joint doctrine. Joint doctrine discussions are largely at the operational level and each publication is subject to systematic review following publication in accordance with Chairman, Joint Chiefs of Staff Instructions (CJCSI) 5120.02, *Joint Doctrine Development System*. In addition, changes may be made out of the normal revision cycle to address lessons learned. Joint doctrine is available through the Internet and a distributed learning (web-based) environment.

Extant joint doctrine, reflecting current capabilities and practice, contains guidance for warfighting commanders regarding operational planning for and handling of prisoners of war (POW) and detainees. 18 Joint Publications (JP) address detainee operations and 16 address interrogation operations. Seminal documents include:

- JP 1-0, *Personnel Support to Joint Operations*, 1998
- JP 2-01, *Intelligence Support to Military Operations*, 2004
- JP 5-00.1, *Joint Doctrine for Campaign Planning*, 2002
- JP 5-00.2, *Joint Task Force Headquarters Planning Guidance and Procedures*, 1999

Joint doctrine continues to be revised in order to meet warfighter requirements. Detainee and interrogation operations are currently addressed in the following draft publications:

- JP 3-63, *Detainee Operations*, is a stand-alone joint publication delineating detainee operations doctrine. Publication is expected in the near future - pending approval of DOD 2310, *DOD Detainee Program.*
- JP 2-01.2, *Counterintelligence and HUMINT Support to Joint Operations,* deals with interrogation operations. Approval and publication is expected in the 3rd Quarter of 2006.
- JP 3-0, *Joint Operations*, details need for restraint and exercise of sound judgment when dealing with POWs and detainees. Approval and publication is expected in the 3rd Quarter of 2006.
- JP 5-0, *Joint Operations Planning*, contains support planning considerations regarding POWs and detainees. Approval and publication is expected in the 4th Quarter of 2006.

Commanders ensure that all detainees are treated humanely, all intelligence interrogations are conducted in accordance with applicable law and policy; torture is prohibited; and violations and any incidents must be reported immediately.

Mechanisms to enforce this include inspector general visits, command visits and inspections, Congressional and intelligence oversight committees and visits; Unit Standard Operating Procedures (SOPs), and the chain of command. Personnel are certified by their Service at the initial entry training and awarded the interrogation skill identifier.

Combatant Commander (Theatre) Training Requirements

In Central Command (CENTCOM), each Service trains its deploying personnel and other armed forces personnel as tasked by Department of the Army and Joint Forces Command on the rules of engagement for the area to which they are deploying, the Geneva Conventions, the Law of Land Warfare, and detainee handling. The doctrinal proponent of the Services and Joint Forces Command develop training programs, standards, and revisions as applicable using information provided by their embed teams and other sources. These proponents provide assistance in terms of training material, equipment, and subject matter experts to assist in conducting training. Each Service

coordinates with their doctrinal proponents for updates and subject matter experts.

In Pacific Command (PACOM), personnel, including those deploying into the U.S. Pacific Command Area of Operations (USPACOM AOR), receive Law of Armed Conflict (LOAC)/Human Rights briefings either before deploying to ongoing USPACOM operations or upon arrival in theater. Other personnel in the USPACOM AOR receive yearly LOAC briefings tailored to their job specialty through their service components. USPACOM is developing a detailed instruction on interrogation. In the interim, PACOM issued a policy letter on humane treatment of detainees and that all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy.

In European Command (EUCOM), all personnel, including contractors, are required to receive Law of Armed Conflict (LOAC) prior to deploying in support of peacekeeping or other military operations. (See Secretary of Defense (SECDEF) Memorandum dated APR 11 20005, "FY 2005 National Defense Authorization Act Provisions Regarding Persons Detained By the Department of Defense); United States Army Europe (USAREUR) Directives for U.S. Army Forces Command and Control in Kosovo and Bosnia Areas of Operation, dated 19 May 2005). In addition to the pre-deployment training requirement, all personnel are required to receive at least annual LOAC training when deployed in support of USAREUR military operations.

The Army Training Policy (AR 350-1) and the USAREUR Directive on Contingency Holding Facilities, dated 29 June 2004, require that any personnel engaged in activities involving detainees receive LOAC training that incorporate the principles embodied in the UN Convention Against Torture as well as other international and domestic obligations. The USAREUR/7A policy goes further and prohibits contractors from participating in the interrogation of detainees. (See AER Supplement 1 to AR 190-8, 3 Nov 04; USAREUR/7A Handbook, "Contingency Holding Facility and Interrogation Operations," Oct 2004).

With respect to education programs in EUCOM, USAREUR/7A military personnel involved in the custody, interrogation or treatment of

detained persons are subject to a number of regulations, command policies, training programs and standard operating procedures (SOPs) that are intended to ensure comprehensive adherence to U.S. law and applicable international law. Further, USAREUR/7A personnel and detention facilities are also subject to regular inspections from the Inspector General at all Army levels as well as bi-annual Staff Assistance Visits (SAV), to ensure that personnel and facilities that deal with detainees are reviewed systematically.

Revised versions of Army in Europe Regulation (AER) 27-8 (USAREUR Law of War Program) and AER Pamphlet 350-27 (Army Soldier Rules) require "qualified instructors" to conduct at least annual LOAC training for all military personnel. These training requirements are similarly reflected in AER 350-1 and the newly published AR 350-1, 13 Jan 06. In addition to SAV's, USAREUR/7A staff sections, including the Office of the Provost Marshal, the USAREUR G2 and the Office of the Judge Advocate are required to conduct at least one unannounced on-site inspection of each contingency holding facility.

Included in these SAVs are checklists from each staff section that require detention facility personnel to review, and if necessary, adjust all facility procedures (including interrogation), and facility infrastructure to comport with all of the legal and medical requirements relating to the treatment of detainees. Only MOS qualified personnel are authorized to handle or interrogate detained persons within the USAREUR/7A AOR and only trained and certified personnel are permitted to handle detainees.

Additionally, commanders of detention facilities are required to establish comprehensive SOPs in accordance with the USAREUR policy and must present these SOPs for review during SAVs and during unannounced, on-site inspections. These requirements are reflected in AER Supplement 1 to AR 190-8, 3 Nov 04; USAREUR/7A Handbook, "Contingency Holding Facility and Interrogation Operations," Oct 2004; and the USAREUR Command Directives for Bosnia and Kosovo, 19 May 2005.

In Southern Command (SOUTHCOM), USSOUTHCOM Regulation 1-20 requires that all Department of Defense (DoD) personnel, including civilian employees and contractors on DoD contracts, take human rights training prior to deploying into the

USSOUTHCOM Area of Responsibility or upon assignment to USSOUTHCOM and annually thereafter. All must take a related exam and receive a score of at least 80%.

Both the HR training and exam are delivered via a computer-based training module (CBT). The CBT includes the following information:

1. Definition of human rights, including information on international and regional human rights treaties (including the UN Convention against Torture)
2. Trafficking in persons
3. The relationship between human rights, customary international law, and the Law of Armed Conflict (Law of War, International Humanitarian Law)
4. Department of Defense personnel responsibility to promote respect for human rights
5. History of human rights violations in USSOUTHCOM's Area of Responsibility
6. USSOUTHCOM human rights policy of zero tolerance for human rights violations with four basic tenets:
   a. Requirement for human rights training
   b. Duty to report any human rights violation observed immediately through the chain of command
   c. Requirement to include human rights component in all activities with partner nation militaries, such as exercises, training courses, etc.
   d. Issuance of card with human rights standing orders
7. Specific responsibilities of DoD personnel if they witness a gross violation of human rights by either U.S. or partner nation personnel, covered by the Five R's : Recognize, refrain, react, record, report.
8. Current human rights issues in the region

As the Joint Trainer, U.S. Joint Forces Command (USJFCOM) provides training and exercises to DoD elements in furtherance of the Chairman's Exercise Program and in response to request for training from other combatant commanders. That training process, in summary, consists of academic programs and exercise events. There are no academic programs presented by USJFCOM which specifically address CAT or other international human rights instruments. In certain exercises, dependent on the training audience, events are submitted to

stimulate activities related to detainee operations, to include procedures for reporting detainee abuse.

Armed Services

The Army informs its personnel of their obligations under the Convention as follows:

- Law of War training. U.S. Army personnel and leaders at all levels receive Law of War training throughout their careers commensurate with their duties and responsibilities. This training does not specifically address the Convention against Torture (CAT) as a stand alone body of instruction; however, the substantive CAT provisions on torture and cruel, inhumane and degrading treatment are incorporated in the broader instruction provided to all soldiers, which includes the full range of protective provisions contained in Common Article 3 of the Geneva Conventions.

- Army Regulation 350-1, *Army Training and Leader Development*, provides specific regulatory guidance concerning Law of War training and integration of detainee operations training into other appropriate training events.

- Military contractors are trained on their obligations to comply with U.S. military policy when performing detainee and detainee interrogation operations.

- Contract interrogators are subject to additional requirements. In accordance with Department of the Army policy memorandum, "Contract Interrogator Selection and Training Requirements," contract interrogators must be graduates of the U.S. Army or Marine Corps interrogation training course or have equivalent experience and then be re-certified in proper interrogation tactics, techniques and procedures by attending the Enhanced Analysis and Interrogator Course. The policy memorandum also directs that contract interrogators receive training on the rules governing the treatment of detainees under the Geneva Conventions and Law of Land Warfare, prior to conducting interrogations. Further, the organizational Commander or Director, grade O-6/GS-15 or above, initiating the contract must certify that the contractor completed training.

- "The Soldier's Rules" (*AR 350-1, para 4-18b*) stipulates that Soldiers will not harm enemies who surrender, will not kill or torture enemy prisoners of war, will treat civilians humanely, will do their best to prevent violations, and will report all violations of the law of war.

With respect to education, Army doctrine meets and exceeds U.S. law, policy, and international obligations. Army doctrine guides training and operations while incorporating lessons learned for both detainee and detainee interrogation operations. All soldiers receive training to reinforce humane treatment. Soldiers responsible for detainees are guided by Army detainee operations policy and doctrine (*i.e.*, AR 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* and FMI 3-19.40, *Internment /Resettlement Operations*) to conduct detainee operations across the spectrum from the moment of capture until they are transferred, repatriated, or released.

The United States Air Force trains its personnel on a recurring basis in the principles of the law of armed conflict. Pursuant to AFPD 51-4 (*Compliance with the Law of Armed Conflict*), AFI 51-401 (*Training and Reporting to Ensure Compliance with the Law of Armed Conflict*), and DODD 5100.77(DOD Law of War Program)), Air Force commanders ensure their people are trained in the principles and rules of LOAC needed to carry out their duties. This includes, as a minimum, training required by the 1949 Geneva Conventions for the Protection of War Victims and the Hague Convention of 1907. Included in this training is the responsibility to report suspected violations of the law of armed conflict so that appropriate action can take place.

With respect to education, Air Force Security Forces have deployed to perform duty as detainee/prison guards. Air Force Office of Special Investigations (AFOSI) personnel have deployed to perform duty as interrogators. These deployments have been "in lieu of" U.S. Army taskings and personnel have been placed under the C2 of U.S. Army commanders. In accordance with the response to Question 93 above, all AF personnel receive Law of Armed Conflict (LOAC) training annually. Those involved in the custody, interrogation and treatment of individuals in detention receive training upon assignment to those locations. The U.S. Army, as lead service for detention facilities, provides the education programs and information, rules, instructions and mechanisms of systematic review.

Navy commands provide extensive training on the law of armed conflict, especially prior to deployment, on subjects that would include proper treatment of prisoners of war and other detainees in accordance with Department of Defense Directive 5100.77 of December 9, 1998 (DoD Law of War Program), Secretary of the Navy Instruction 3300.1B of December 27, 2005 (Law of Armed Conflict (Law of War) Program to Ensure Compliance by the Naval Establishment), and Chief of Naval Operations Instruction 3300.52 of March 18, 1993 (Law of Armed Conflict (Law of War) Program to Ensure Compliance by the U.S. Navy and Naval Reserve).

The primary regulation concerning custody of personnel is Army Field Manual 190-8. Several regulations apply to the interrogation of individuals, including Department of Defense Directive 3115.09 of November 3, 2005 (Intelligence Interrogations), and the Army Field Manual 34-52 of September 28, 1992 (Interrogation Manual, which will be replaced by Army Field Manual 2-22.3 in the near-future). The primary regulation concerning treatment (presumably medical) of individuals is Assistant Secretary of Defense for Health Affairs memorandum of June 3, 2005 ("Medical Program Principles and Procedures for the Protection and Treatment of Detainees in the Custody of the Armed Forces of the United States").

With respect to training personnel for operations at Guantanamo Bay, the Joint Detention Group (JDG) (guard force) personnel complete training in Gulfport, Mississippi and Fort Lewis, Washington. These personnel receive approximately four weeks of pre-deployment training on topics such as: Law of War and Rules on the Use of Force, actual use of nonlethal weapons, combat life saving training, frisk and search procedures, and cultural awareness. At the end of this training, the personnel complete a Situational Training Exercise (STX) evaluation.

Once assigned duties at Guantanamo Bay, personnel receive continuous training throughout their assignment including lethal weapons training.

With respect to operations in Iraq, individuals receive two weeks of training at Fort Jackson, South Carolina, on topics concerning Enemy Prisoners of War, Rules of Engagement and Rules for the Use of Force

before being provided specific training for the types of operations that they will be performing (such as civil affairs support, etc.).

With respect to interrogators, per current Department of Defense (DoD) policy, the Director, Defense Intelligence Agency (DIA), in his role as Defense Human Intelligence Manager (DHM), is responsible for establishing interrogation training and certification standards to ensure all personnel who conduct DoD intelligence interrogations are properly trained and certified. To date, DHM has recognized the three existing DoD interrogation courses (the Marine Counter Intelligence/Human Intelligence course, the Army 97E HUMINT Collector course, and the DIA/DH interrogation course) as meeting the requirements/standards for certification. All three of these courses have blocks of instruction on the applicable laws, policies and standards governing the treatment of detained individuals. All Navy personnel are required to successfully complete one of these three courses before serving as an interrogator.

Individuals being assigned to Guantanamo Bay (Joint Interrogation Group, or JIG) receive training in Gulfport on topics such as law of armed conflict, followed by the Army 20-week 97E course at Fort Huachuca, Arizona. At Fort Huachuca, interrogators also complete the U.S. Army Enhanced Analyst Interrogator Training (EAIT) course.

After reporting to Guantanamo Bay, JIG personnel continue to receive training.

With respect to the treatment of personnel, the Joint Medical Group personnel also complete pre-deployment training at Gulfport, and for those going to Guantanamo, they receive training on matters such as detainee interaction and safety training in case of an incident with a detainee. There are no different standards in medical care for detainees or servicemembers – both receive the same level of care.

The Marine Corps also has a robust Law of War (LOW) training program, which is set forth in Marine Corps Order 3000.4. It requires LOW training at the entry and follow-on levels, as well as requiring specialized training for commanders and their staffs. It also requires intensive detailed training of Marine Judge Advocates.

The Marine Corps currently trains LOW/ROE across the training and education continuum. This includes the requirement to treat

detainees humanely. There is an on-going effort to improve and formalize follow on LOW training in light of current and future operations. Specifically, Marine Corps Training and Education Command's (TECOM) goal is to review and develop required knowledge sets by grade, billet/MOS for training and develop and publish method of assessment for pre-deployment training for all USMC units deploying ISO OIF/OEF.

In addition, all Marines attending the Basic Lawyers Course, Naval Justice School, Newport, RI, are required to receive training in the LOW and Operational Law (OPLAW) in order to be certified as Judge Advocates. This weeklong course of instruction includes specific instruction on each of the Geneva Conventions, and emphasizes the humane treatment of all persons. Moreover, the International and Operational Law Branch, Headquarters, U.S. Marine Corps, provides refresher LOW and OPLAW training to all Judge Advocates scheduled to deploy to Iraq. This refresher training also includes specific courses on each of the Geneva Conventions.

The U.S. Marine Corps LOW Reserve Detachment (LOW DET) provides specialized LOW training to commanders and their staffs throughout the year. The LOW DET, at a minimum, travels to each of the major commands on the East Coast, West Coast, and WESTPAC, once a year. The LOW DET has been involved in the pre-deployment training at the Battalion level as well.

With respect to education, the Marine Corps' Enemy Detainee Operations Course (EDOC), taught at Marine Detachment Lackland AFB, TX, provides information in all areas noted to pipeline corrections course graduates, Military Occupational Specialty (MOS) 5831. This instruction is based on FM27-10, *The Law of Land Warfare,* and FM3-19.40, and other established references and doctrine. All Marines assigned to detention missions are provided a detailed training package developed by TECOM in detention operations during pre-deployment training. In addition, a Mobile Training Team (MTT) based on EDOC has been provided on (2) occasions for provisional MP units slated to guard enemy detainee facilities as pre-deployment training.

CI/HUMINT Marines, MOS 0211, who are the only Marines authorized to conduct interrogations, are trained in the Geneva

Conventions, and the LOW during the MOS producing school at the Navy and Marine Corps Training Center.

Service Academies

Each of the services has a military academy. For the U.S. Army, it is the United States Military Academy located at West Point, New York. The United States Naval Academy is located at Annapolis, Maryland, and the Air Force Academy is located at Colorado Springs, Colorado. Each academy has both required and elective courses in law. As part of that curriculum, the law of war is taught to the students and includes discussions on the prohibition of torture.

For example, the United States Military Academy discusses torture, the CAT, and some leading cases during the required law of war course. In the advanced law of war classes, several classes are devoted to the subject of the CAT and prohibitions on torture and maltreatment. It delves into case law, case studies, both actual and imagined, and also includes a discussion of related ethical issues.

Annex 4 (Question 30)
Statistical Data on Deaths in Bureau of Prisons Facilities

Fiscal Years (FY) 2001-2005 Deaths by Gender

Gender	BOP Facilities					CCCs					Private Facilities Under Contract w		
	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03
Female	12	14	20	16	25	3	2	0	1	0	0	0	0
Male	278	285	363	314	365	31	42	31	19	22	5	9	6
Total	290	299	383	330	390	34	44	31	20	22	5	9	6

Fiscal Years (FY) 2001-2005 Deaths by Age Categories

Age Range	BOP Facilities					CCCs					Private Facilities Under Contract w		
	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03
40-49	85	59	104	87	91	7	12	16	6	7	3	2	2
50-59	82	101	127	101	135	12	11	3	5	9	1	2	2
60-69	48	71	65	68	74	3	5	2	1	3	0	1	0
70-79	23	16	32	24	31	1	1	0	1	0	0	0	0

80-89	3	1	1	5	3	0	0	0	0	0	0	0	0
90+	0	0	0	1	1	0	0	0	0	0	0	0	0
Total	290	299	383	330	390	34	44	31	20	22	5	9	6

Fiscal Years (FY) 2001-2005 Deaths by Ethnicity

Ethnicity	BOP Facilities					CCCs					Private Facilities Under Contract wi		
	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03
Asian	3	4	6	2	4	0	0	0	0	0	0	1	0
Black	98	103	131	108	116	6	12	12	10	4	1	3	2
Black-Hispanic	5	3	4	5	11	0	2	0	0	0	0	0	0
Native American	0	0	0	5	6	0	0	0	1	0	0	0	0
Other	7	2	8	1	0	0	1	1	0	0	0	0	0
Unknow	0	0	1	0	0	13	8	1	1	0	0	0	0

n													
White	114	146	163	148	187	10	12	9	3	13	1	4	0
White-Hispanic	63	41	70	61	66	5	9	8	5	5	3	1	4
Total	290	299	383	330	390	34	44	31	20	22	5	9	6

Fiscal Years (FY) 2001-2005 Deaths by Cause of Death
Fiscal Years (FY) 2001-2005 Deaths by Cause

	BOP Facilities					CCCs					Private Facilities Under Contract w		
	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03	FY 04	FY 05	FY 01	FY 02	FY 03
Accidental	4	6	6	3	8	0	0	2	1	0	0	0	0
Execution	2	0	1	0	0	0	0	0	0	0	0	0	0
Homicide	9	4	3	4	15	1	2	1	0	1	0	0	0
Natural Causes	260	274	363	314	355	9	14	8	1	8	4	9	3
Suici	15	15	10	9	12	1	1	0	0	2	1	0	0

de													
Unknown[1]	0	0	0	0	0	23	27	20	18	11	0	0	3
Total	290	299	383	330	390	34	44	31	20	22	5	9	6

[1]pending final autopsy results or death certificates

Annex 5 (Question 30)
Statistical Data on Deaths in Immigration and Customs Enforcement Facilities

Location of Detention

Location	Number of Aliens
ICE-owned Service Processing Center (SPC)	2
Contract Detention Facility (CDF)	1
Intergovernmental Service Agreement (IGSA) Facility	10
Bureau of Prisons (BOP) Facility (including medical facility)	9
Hospital/Nursing Home/Chronic Care Facility	28

Gender

Gender	Number of Aliens
Male	45
Female	5

Age

Age Bracket	Number of Aliens
Under 18	0
18—40	15
41—60	25
61—80	9
Over 80	1

Ethnicity of the Deceased

Ethnicity	Number of Aliens
Asian	2
Black/African	7
Caucasian	1
Latino/Hispanic	38
Middle Eastern	2

Cause of Death

Cause of Death	Specifics, if applicable	Number of Aliens
Natural	Atherosclerosis	2
	Brain-Related (*e.g.*, aneurism, stroke)	5
	Cardiac-Related	13
	Cancer	3
	Chronic Care (*e.g.*, renal failure, liver disease)	11
	HIV/AIDs	7
	Other (e.g., accidents, slips and falls)	2
Homicide/Manslaughter/Assault		0
Suicide		7

Annex 6 (Question 30)
Statistical Data on Deaths in Customs and Border Protection Facilities

Location of Custody

Deaths in CBP Office of Field Operations (OFO) custody occurred at the following locations during calendar year 2005:

Location	**Number of Aliens**
Laredo	1
El Paso	1

Deaths in CBP Border Patrol Sectors occurred at the following locations since 4/2005:

Location	**Number of Aliens**
Tucson Sector	1
Laredo Sector	1
Rio Grande Valley Sector	1
Calexico Sector	1

Gender

The following deaths in CBP OFO custody occurred during calendar year 2005:

Gender	**Number of Aliens**
Male	2
Female	0

In Border Patrol Custody since 4/2005:

Gender	Number of Aliens

Male	3
Female	1

Age

The following deaths in CBP OFO or Border Patrol custody occurred during calendar year 2005:

Age Bracket	**Number of Aliens**
Under 18	0
18—40	5
41—60	0
60 and Older	0

(Note: The age of one person was unknown.)

Ethnicity

The following deaths in CBP [OFO or Border Patrol] custody occurred during calendar year 2005:

Ethnicity	**Number of Aliens**
United States Citizen	2
Mexican Citizen	4

Cause of Death

The following deaths in CBP [OFO or Border Patrol] custody occurred during calendar year 2005:

Cause of Death	**Number of Aliens**
Suicide	1
Possible suicide	1
Attempted escape	2

Medical condition (seizure)	1
Possible medical condition (viral infection)	1

Annex 7 (Question 30)
Statistical Data on Deaths under Department of Defense Control

Army Investigations

In the Army, there were 6 investigations of detainees who died as a result of an alleged assault or as a result of an alleged act of unlawful violence while in U.S. custody in Afghanistan. A brief synopsis of each investigation is provided.

1. On 21 Jun 03, at the Asadabad Fire Base, a detainee died while in U.S. Army custody. Testimony from various Soldiers identified a civilian employee of another agency as being responsible for physically assaulting the detainee prior to his death.

2. On 4 Dec 02, at the Bagram Detention Facility, a detainee died while in U.S. custody. An autopsy determined the detainee had suffered blunt force trauma. Investigation determined various enlisted MI and MP Soldiers were involved at various times in assaulting and mistreating the detainee. See courts-martial summary below.

3. On 10 Dec 02, at the Bagram Detention Facility, a detainee died while in U.S. custody. An autopsy determined the detainee had suffered blunt force trauma. Investigation determined various enlisted MI and MP Soldiers were involved at various times in assaulting and mistreating the detainee. See courts-martial summary below.

a. On 18 May 2005, charges were referred against SGT S for Dereliction, Battery and Maltreatment. Pleading guilty, SGT S was convicted of Dereliction and Assault on 4 August 2005 and sentenced to reduction to E4, forfeiture of $250 pay per month for 4 months, and a reprimand.

b. SPC B was charged with Assault, Maltreatment, False Swearing, and Involuntary Manslaughter and Maiming on 3 February 2005. SPC B was found guilty of Aggravated Assault, Maltreatment, Maiming, and False Official Statement and acquitted of three Assault charges. On 16 August 2005, SPC B was sentenced to Reduction to E-1.

c. On 20 May 2005, SPC C pled guilty to Assault and False Official Statement and was sentenced to reduction to E-1, forfeiture of 2/3 pay for 4 months, and confinement for 3 months.

d. On 28 September 2005, SPC C pled guilty to Maltreatment, False Official Statement and Battery and was sentenced to 5 months confinement.

e. On 30 August 2005, SPC M pled guilty to Assault and Dereliction of Duty at Special Court-Martial. He was sentenced to reduction to E-1, 75 days confinement, and a Bad-Conduct Discharge.

f. On 23 August SPC W pled guilty to Dereliction of Duty and Assault Consummated by Battery and sentenced to a reduction to E1, forfeiture of $822 of pay per month for 2 months, 2 months confinement, and a Bad-Conduct Discharge.

g. On 7 September 2005, SGT G was acquitted by a court-martial panel of all charges of Maltreatment, Assault, and False Statement.

h. On 8 September 2005, SGT B was acquitted by a court-martial panel of all charges of Maltreatment, Assault, and False Official Statement.

i. On 3 November 2005, SGT G was acquitted by a court-martial panel of all charges of Maltreatment and Dereliction.

j. On 22 February 2006, SGT D was convicted of all charges of Aggravated Assault, Maltreatment, and False Official Statement.

4. On 6 Nov 03, at FOB Gereshk, a detainee was found dead in his cell. The detainee had been in custody for 48 hours prior to his death. Afghanistan Militia Forces had interrogated the detainee for an unknown period before being released to U.S. custody. When received into U.S.

custody, he had bruising about his hips, groin, and buttocks. An autopsy revealed multiple blunt force injuries complicated by rhabdomyolysis (tissue death). The matter was referred to Afghanistan authorities for investigation.

5. In Feb 03, While in custody of Afghan authorities seven Afghan nationals alleged they were abused by US soldiers when they were previously detained at Gardez Detention Facility and that a detainee had been killed by US soldiers while detained at Gardez. Subsequent investigation revealed that US soldiers failed to report a death of a detainee at Gardez, two soldiers allegedly assaulted the detainee who died and that several soldiers physically abused other detainees. The allegations of physical abuse and killing are from Afghan nationals who have been released. Efforts are underway to locate Afghan nationals as possible witnesses in potential action against several U.S. soldiers.

6. On 28 Aug 02, near Lwara, an Afghanistan male was detained because he was following a U.S. Army patrol. While being detained and questioned, he allegedly lunged for a weapon and was shot and killed. Subsequent investigation indicated that story was false. Five Soldiers were identified for the offenses of Conspiracy, Murder, Dereliction of Duty and Obstruction of Justice. Upon legal review, prosecutors determined the case lacked prosecutorial merit.

The Army conducted 19 investigations of detainees who died as a result of an alleged assault or as a result of an alleged act of unlawful violence while in U.S. custody in Iraq. A brief synopsis of each investigation is provided.

1. On 11 Sep 03, at the Forward Operating Base Packhorse detention facility, a detainee died while in U.S. custody. Investigation determined a soldier, while on guard duty, failed to follow the rules of engagement and wrongfully shot the detainee who was standing close to the perimeter wire. Charges were originally preferred against the Soldier. Soldier was subsequently discharged in Lieu of Court-Martial Under AR 635-200, Chapter 10 with an Other than Honorable Discharge.

2. On 13 Jun 03, at Camp Cropper in Baghdad, a detainee died while in U.S. custody. While in custody, the detainee was subjected to both physical and psychological stress. Because of several escape attempts, as

well as assaulting guards, the detainee was restrained to a chair using flexible handcuffs. The detainee continued attempts to escape with the chair secured to a pipe. About two hours later, an interpreter entered the room and discovered the detainee deceased. An autopsy determined he died of a subdural hematoma to the head. Investigation determined there was probable cause to believe four soldiers committed assault and dereliction of duty in connection with this matter. There was insufficient evidence to link any one soldier's actions to the death of the detainee.

3. On 4 Nov 03, at the Abu Ghraib detention facility, a detainee died while in U.S. custody. The detainee died during an interview process by Navy SEAL and other governmental agency personnel. Allegedly, the detainee also resisted arrest and had to be physically restrained. Further investigation by the U.S. Navy determined seven U.S. Navy personnel confessed to assaulting the detainee.

4. On 26 Nov 03, at FOB Tiger in Iraq, a detainee died while in U.S. custody. Testimony from various soldiers indicated local national interviews of the detainee on 24 and 25 Nov 03 had involved physical assaults. On 26 Nov 03, the detainee died while undergoing "stress technique" interrogation by MI and other soldiers. Investigation determined there was probable cause to believe seven soldiers were responsible for the death and/or related offenses.

a. On 21 January 2006, CW3 W was convicted of Negligent Homicide and Negligent Dereliction of Duty and was sentenced to forfeiture of $1,500 pay per month for 4 months, 60 days restriction, and a reprimand.

b. Other cases are pending trial.

5. On 9 Jan 04, at FOB Rifles, Al Asad, a detainee died while in U.S. custody. The detainee had been taken into custody on 4 Jan 04, placed in an isolation cell and questioned at least two times in ensuing days. An examination of the detainee's remains disclosed extensive bruising on his upper body, and an autopsy indicated the cause of death as blunt force injuries and asphyxia. Investigation determined there was probable cause to believe eleven soldiers were responsible for various assaults and the death of the detainee. A subsequent legal review determined that the

detainee died as a result of a series of applications of lawful force in response to aggression by the detainee.

6. On 5 Apr 04, at LSA Diamondback, Mosul, a detainee died in U.S. custody. The detainee was taken into U.S. custody by Navy SEAL team after a struggle. After being interrogated, the detainee was allowed to sleep. At 0137, 5 Apr 04, the detainee was checked and found to be unresponsive. Autopsy results indicate multiple minor injuries; however, there was no definitive evidence of any trauma significant enough to explain the detainee's death. The matter was referred to U.S. Navy for follow-up investigation.

7. On 31 Jan 04, at Camp Cropper, a detainee died in U.S. custody. The detainee, who was being treated for chest pains at an Army hospital reportedly fell out of bed, struck his head on the floor, and lapsed into a coma. A CAT scan and surgery revealed inter-cranial bleeding and signs of prior head injuries. The detainee subsequently died on 31 Jan 04. The detainee had been in U.S. custody for over a year. The autopsy determined the cause of death as internal bleeding on the brain; however, the manner of death was listed as undetermined.

8. On 22 Mar 05, at Camp Charlie, Al Hillah, a detainee, who was initially detained and interrogated by Iraqi Police (IP) for his alleged involvement against Coalition Forces, died. The IP videotaped their interrogation wherein the detainee alleged he was kidnapped and beaten by another clan, before IP apprehended him. The detainee was medically screened by U.S. Forces, when the U.S. assumed custody of him, on the same day of his death. It found apparent visible blunt force injuries (bruises). An autopsy revealed numerous indications of injury; however, without background information to give the injuries context, the Medical Examiner was unable to give an opinion as to the manner of death.

9. On 28 Feb 04, near Taal Al Jal, Kirkuk, a detainee resisted when a soldier attempted to place flexi-cuffs on him. A second soldier raised his weapon to protect the first soldier. The first soldier was able to complete the cuffing process and was leading the detainee away when the second soldier fired one round from his weapon which struck the detainee in the head and killed him. Investigation determined there was probable cause to believe the soldier committed the offense of murder.

a. On 5 August 2004, PFC R was convicted by a court-martial panel of Voluntary Manslaughter and acquitted of Unpremeditated Murder. PFC R was sentenced to Reduction to E-1, total forfeitures, confinement for 3 years, and a Dishonorable Discharge.

10. On 3 Jan 04, near Samarra, a detainee was apparently drowned after he was forced off a bridge by Soldiers. The detainee had been taken into custody after having been found out after hours. Investigation determined there was probable cause to believe four soldiers committed the offense of involuntary manslaughter.

a. On 14 March 2005, LT S pled guilty to Obstruction of Justice, Dereliction of Duty, and Aggravated Assault. A Manslaughter charge was dismissed. LT S was sentenced to forfeiture of $2,000 pay for 6 months and confinement for 45 days.

b. On 4 January 2005, SFC P was convicted of Battery, Aggravated Assault, and Obstruction of Justice and was acquitted of Manslaughter. SFC P was sentenced to reduction to E-6, forfeiture of $2004 for one month, and confinement.

11. On 20 Aug 04, in Sadr City, Iraq, U.S. Forces engaged a hostile vehicle. Once the vehicle was demobilized, three soldiers approached the vehicle to evaluate casualties. During their evaluation, an Iraqi citizen was determined to have untreatable injuries. One of the soldiers, a 2LT, ordered the other two soldiers, both SSGs, to shoot the victim. Both soldiers shot and killed the Iraqi. Investigation determined there was probable cause to believe the soldiers committed the offenses of conspiracy and murder.

a. On 10 December 2004, SSG H pled guilty to Unpremeditated Murder and Conspiracy to Commit Murder and was sentenced to reduction to E-1, total forfeitures, confinement for 3 years, and a Dishonorable Discharge. In post-trial review, the Convening Authority granted clemency to bring SSG H's sentence in line with SSG A's case; the

sentence was reduced to confinement for 1 year and a Bad-Conduct Discharge.

b. On 14 January 2005, SSG A pled guilty to Murder and Conspiracy to Commit Murder and was sentenced to reduction to E-1, confinement for 1 year, and a Bad-Conduct Discharge.

12. In Aug 04, in Sadr City, Iraq, a soldier detained and flexi-cuffed an Iraqi male for possession of an AK-47 rifle. After completing the search of the residence, the soldier instructed other soldiers to remove the flexi-cuffs from the Iraqi. The SGT then shot the Iraqi twice in the chest, killing him. During the same operation, but at another residence, the same soldier discovered another AK-47 rifle and a revolver. After removing the family from the house, the soldier instructed the Iraqi adult male to enter the residence with himself and a second soldier. The first soldier then directed the second soldier to shoot the Iraqi, which the SPC did by firing two rounds, killing him. Investigation determined there was probable cause to believe the soldiers committed the offense of murder.

a. On 13 May 2005, SGT W was convicted on Premeditated Murder was sentenced to reduction to E-1, total forfeitures, confinement for life with eligibility for parole, and a Dishonorable Discharge. Pursuant to an agreement, the period of confinement was limited to 25 years.

b. On 9 April 2005, SPC M was convicted of Unpremeditated Murder and was sentenced to reduction to E-1, confinement for 5 years, and a Dishonorable Discharge.

13. On 21 May 04, in An-Najaf, two wounded Iraqis were captured. One of the detainee's injuries was determined to be terminal by the military medic. When the medic departed to treat the other wounded detainee, a soldier lowered his weapon and fired what appeared to be two shots into the back of the detainee's head, killing him. Investigation determined there was probable cause to believe the soldiers committed the offense of murder. On 30 March 2005, the Soldier was convicted of Assault with Intent to commit Voluntary Manslaughter and sentenced to a dismissal.

14. On Dec 03, at an Army hospital in Balad, an Army doctor reported an unknown, unidentified white male American, believed to be a U.S. Forces soldier, brought in an injured (bruise on forehead), unconscious, unknown/unidentified detainee for evaluation. According to the person who delivered the detainee to the hospital, the detainee had fallen unconscious during an interrogation session. A subsequent CT scan revealed a dated blunt force trauma injury to the detainee's head as well as a subdural hemorrhage. The detainee subsequently died of his injuries. Investigation failed to identify the parties responsible.

15. On 25 Oct 04, in Balad, during an operation, numerous small arms weapons and ammunition were discovered in a residence. Subsequent to the search, the Iraqi citizen was detained and placed in flexi-cuffs while other members of the household were interviewed. Investigation revealed the soldier admitted the detainee was flexi-cuffed and he was interrogating him regarding ownership of an AK-47 discovered in the residence. The soldier then shot and killed the detainee. On 18 May 2005, SFC D was convicted of Unpremeditated Murder and Assault and sentenced to Reduction to E1, Confinement for 7 years, and a Dishonorable Discharge.

16. On 3 Jan 04, near Balad, during an operation, an Iraqi was captured whose name was reportedly on a list of possible insurgents. The squad leader told his soldiers to stand back, and when they did so, the squad leader shot the Iraqi several times in the body, killing him. The squad leader then produced a non-U.S. military 9mm pistol, fired one shot from the pistol at the entrance door to the residence and had the soldier place the pistol in the dead Iraqi's hand. On 26 May 2005, the Soldier was acquitted of all charges by a court-martial panel

17. On 11 Nov 04, near Mosul, a unit was engaged under small arms fire with insurgents. As a result of the firefight, one Iraqi was injured. He was captured and detained; however, during treatment, he became limp and unresponsive. Shortly thereafter, the unit came under attack a second time. The unit made a decision to leave the detainee behind, but, as they were pulling away, a soldier fired two rounds into the detainee. Investigation determined there was probable cause to believe the soldiers committed the offense of murder. Charges were originally preferred against the soldier. Soldier was subsequently discharged in Lieu of

Court-Martial Under AR 635-200, Chapter 10 with an Other than Honorable Discharge.

18. On 28 Mar 05, in Sukair, after a pursuit of an occupied vehicle related to mortar and improvised explosive device attacks in the area, the vehicle stopped at a residence. The occupants were detained, separated, flexi-cuffed and individually guarded by soldiers. At some point during the detention, one of the soldiers shot and killed one of the detainees. Investigation continues.

19. On 3 Jan 04, in Balad, during the conduct of a raid, an Iraqi allegedly produced a 9mm pistol after being restrained by soldiers. One of the soldiers shot and killed him. Witness statements from family members contradict the details of the incident. The investigation continues.

In every case, allegations involving the death (or any allegation of abuse of a detainee) were fully and impartially investigated and the cases are carefully reviewed for prosecution. Some of these cases are still pending trial.

Navy Invesigations

The Department of the Navy, Naval Criminal Investigative Service (NCIS), has investigated two deaths of individuals under Navy control

1. On April 5, 2004, Farhad Mohamed was delivered to medical authorities at Mosul Airfield, Iraq, where life-saving procedures were unsuccessful. No abuse was reported, but the final autopsy concluded that the cause and manner of death were undetermined. On September 1, 2005, the NCIS investigation was closed.

2. On November 4, 2003, Manadel Al-Jamadi – a suspect in the bombing of an International Committee of the Red Cross Facility – died while in U.S. custody at Abu Ghraib prison, Iraq. In June 2004, allegations were raised that members of SEAL TEAM SEVEN abused Al-Jamadi and took unofficial pictures of detainees; NCIS initiated an investigation. One member of SEAL TEAM SEVEN was tried before a general court-martial for the charges of dereliction of duty, false official statement, and assault (other cases were resolved through alternate

means). On 27 May 2005, he was acquitted of all charges. There were no charges of homicide because it could not be determined whether Navy or other personnel had caused the death.

Investigations Related to the Marine Corps

The Marine Corps have fourteen (14) known detainees who have died while being detained or while making escape attempts from USMC detention. The investigations into ten of the deaths are closed. The investigations into four of the deaths, all NCIS investigations, are still open. One of the closed investigations involved two detainee deaths. All the other investigations, both open and closed, involve only one detainee death each. Therefore, the total number of investigations is thirteen (13). The following is a summary of these investigations:

Closed investigations
(Dates refer to the date of death.)

1. 29 March 2003. A Marine guard from Task Force Tarawa shot and killed a detainee at a detainee collection point in An Nasariyah, Iraq, when the detainee attacked the Marine Guard and then lunged for the Marine's service rifle. The NCIS investigation determined that the guard acted in self-defense and no legal action ensued.

2. 6 June 2003. An autopsy determined that a detainee died of strangulation and listed the cause of death as "homicide." Nine Marine Corps suspects (three officers and six enlisted) were charged with offenses under the UCMJ. One officer was convicted at General Court-Martial of violating Article 92 (dereliction), and Article 93 (maltreatment). This officer was sentenced to dismissal. One enlisted was convicted at General Court-Martial of violating Article 92 (dereliction), and Article 128 (abuse of prisoners), and was sentenced to 60 days hard labor, 60 days restriction, and reduction to E-1. One enlisted suspect was subject to administrative discipline. One officer underwent a Board of Inquiry that determined there was no misconduct on the part of that officer. Charges were dropped against the last officer and four enlisted.

3. 13 April 2004. After encountering small arms fire north of Fallujah, a Marine Captain and his unit, elements of 3rd Bn, 4th Marines,

detained an individual. The detainee died after being placed in a chokehold by the Captain. The Captain was charged with offenses under the UCMJ. After completion of an Article 32 investigation, the General Court-Martial Convening Authority (GCMCA) determined the allegations to be unsubstantiated and dismissed the charges.

4. 15 April 2004. A platoon from 2nd Bn, 2nd Marines, lead by a Marine Lieutenant, detained two Iraqis attempting to flee in a vehicle. The detainees allegedly threatened the Lieutenant and/or attempted to flee. The Lieutenant then shot and killed them both. The Lieutenant was charged with offenses under the UCMJ. After completion of an Article 32 investigation, the GCMCA determined the allegations to be unsubstantiated and dismissed the charges.

5. 19 April 2004. A detainee died from head injuries after he removed his restraints and threw himself out of a window during an escape attempt at a 3rd Bn, 7th Marines, holding area in Husaybah, Iraq. A Reportable Incident Assessment Team (RIAT) determined that the detainee died from cranial bleeding. No legal action ensued.

6. 21 June 2004. During an Army raid with Marines from RCT-7, in support near Mosul, a flexi-cuffed detainee died. An Army CID investigation determined the cause of death to be a heart attack. No legal action ensued.

7. 2 October 2004. A 71-year-old detainee died while being detained by 1st Bn, 7th Marines at Al Qaim. An NCIS investigation and an autopsy determined that Nahar had a pre-existing ulcer and heart condition. He died of acute peritonitis from a perforated gastric ulcer. No legal action ensued.

8. 17 December 2004. A detainee was shot during the cordon and search of a house in Fallujah. The search resulted in the discovery of IED materials. As the individuals in the house were being flexi-cuffed, one lunged at a Marine Sergeant, who then shot that individual in the head. An RCT-7 Command Investigation determined that the Sergeant acted in self-defense. No legal action ensued.

9. 20 September 2005. A detainee was shot by a HET Marine near Fallujah after the detainee lunged at the Marine. NCIS investigation did not find any abuse. No legal action ensued.

Open investigations
(Dates refer to the date the investigation was initiated by the NCIS.)

1. 25 May 2005. The father of the victim claims that his son was burned by members of 24th MEU in a house near Mohamudiyah in December 2004. The father did not make a report until six months later.

2. 26 June 2005. Unknown detainee died on 26 June 2005, near Hadithah Dam, after being shot by members of 3rd Bn, 25th Marines, while apparently attempting to escape. There is no allegation of abuse.

3. 22 July 2005. The detainee died at Kalsu of apparent natural causes while in the custody of the 2nd MP Bn. There is no allegation of abuse.

4. 04 January 2006. A 50-year old male detainee being transported to a transitory holding area died of an apparent heart attack. Incident is under investigation by NCIS, Al Asad, IZ.

Annex 8 (Question 36)
Compensation Claims Filed with Army

There have been 33 detainees who have filed claims for compensation. The following table provides a breakdown of the statistical data regarding complaints of torture or ill-treatment according to gender, age, location of the complaint and result of the investigation.

Claim Number	Gender	Age	Location of Alleged Complaint	Result of Investigation
06C90T012	Male	41	Gardez Firebase and Bagram Air Force Base, Afghanistan.	Ongoing.
06C90T013	Male	50	Gardez Firebase and Bagram Air Force Base, Afghanistan.	Ongoing.
05C91T001	Male	52	Abu Ghraib, Iraq.	Investigation complete. Claim denied. Claimant received sympathy payment.
05C90T012	Male	23	Abu Ghraib, Iraq.	Investigation complete. Claim denied.
05C90T013	Male	28	Abu Ghraib, Iraq.	Investigation complete. Claim denied.
05C90T015	Male	42	Abu Ghraib, Iraq.	Ongoing.
05C90T016	Male	27	Abu Ghraib, Iraq.	Ongoing.
05C90T021	Female	42	Tikrit and Abu Ghraib, Iraq.	Ongoing.
05C90T023	Male	65	Adamia Palace, Iraq.	Ongoing.
05C90T024	Male	43	Al-Gezlany[29], Mosul Airport, and Abu Ghraib, Iraq	Investigation stopped. Claim transferred.
05C90T025	Male	Unknown, Approx Fifties	Hai Al Amel, and Abu Ghraib, Iraq.	Investigation complete. Pending denial.
05C90T026	Male	52	Whitehorse Detention Facility, An-Nasiriyah, Iraq.	Ongoing.
05C90T033	Male	31	Gardez Firebase, Kandahar Air Force Base, Bagram Air Force Base, and various locations in Afghanistan.	Ongoing. Claimant has filed suit in federal court.
05C90T035	Male	29	Baghdad International Airport, Camp Bucca, and Abu Ghraib, Iraq.	Ongoing. Claimant has filed suit in federal court.
05C90T036	Male	50	Gardez Firebase, Kandahar Air Force Base, and Bagram Air Force Base, Afghanistan.	Ongoing. Claimant has filed suit in federal court.
05C90T041	Male	62[30]	Iraq	Ongoing.
05C90T042	Male	38	Al-Qasr Al-Jumhouri/Al-Qasr Al-Sujood, Baghdad International Airport, Camp Bucca, and Abu Ghraib, Iraq.	Ongoing.

[29] This spelling appears to be incorrect.

[30] Claimant believes actual birth date to be 1947.

Claim Number	Gender	Age	Location of the Complaint	Result of Investigation
05C90T043	Male	36	Al-Qasr Al-Jumhouri/Al-Qasr Al-Sujood, Baghdad International Airport, and various locations in Iraq.	Ongoing. Claimant has filed suit in federal court.
05C90T048	Male	21	Former Baghdad Police station, Al-Tasferat, Baghdad International Airport, Abu Ghraib Yusufiya, Mosul, and various locations in Iraq.	Ongoing.
05C90T049	Male	61	Camp Copper, Baghdad International Airport and Abu Ghraib, Iraq.	Ongoing.
05C90T050	Male	Unknown	Camp Bucca, and Abu Ghraib, Iraq.[31]	Ongoing.
05C90T051	Male	50	Camp Bucca, Iraq.	Ongoing.
05C90T052	Male	51	Unknown.	Ongoing.
05C90T055	Male	51	H3 Camp, Camp Bucca, Iraq.	Ongoing.
04C90T006	Male	46	Camp Poko, Am Qser, Iraq.	Investigation complete. Claim denied.
04C90T009	Male	Thirties	Abu Ghraib, Iraq.	Ongoing.
04C90T010	Male	27[32]	Abu Ghraib, Iraq.	Ongoing.
04C90T011	Male	49	Asad Airbase prison, Iraq.	Investigation complete. Claim denied.
04C90T012	Male	Unknown	LSA Anaconda, Iraq.	Ongoing.
04C90T013	Male	63	FOB Pacesetter, near Al Duloiya, Iraq.	Investigation stopped. Claim transferred.
04C90T016	Male	Unknown	Abu Ghraib, Iraq.	Ongoing.
04C01T064	Male	60	Outside the Palestine Hotel, Baghdad and Camp Bucca, Iraq.	Investigation complete. Offered Claimant $350 USD.
04C01T065	Male	44	City of Dewaniya and Abu Ghraib, Iraq.	Investigation complete. Offered Claimant $5,000 USD.

[31] Claimant injured during capture.

[32] Need Arabic translation to confirm age.